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No. _____

In The

Supreme Court of the United States

October Term, 1995

STATE OF MONTANA,

Petitioner,

v.

MATTHEW C. FULLER,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Montana

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the Fifth Amendment privilege against self-incrimination bar use, in an independent criminal prosecution, of a probationer's incriminating statements when they were made during sex offender treatment voluntarily entered into as a condition of probation and predicated in part on the probationer's agreement to disclose honestly all offending history?

PARTIES TO THE PROCEEDING

The Petitioner in this Court is the State of Montana.

The Respondent in this Court is Matthew Fuller.

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OPINION BELOW

The opinion of the Montana Supreme Court is reported at *State v. Fuller*, 915 P.2d 809 (Mont. 1996). (App. 1a-39a).

JURISDICTION

The Montana Supreme Court opinion containing the court's judgment was filed on April 16, 1996. (App. 1a-39a.) On June 27, 1996, the time for filing the petition for a writ of certiorari was extended to and including August 14, 1996. Jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. amend. V:

> No person . . . shall be compelled in any criminal case to be a witness against himself. . . .

STATEMENT OF THE CASE

In December 1992 respondent Matthew Fuller was charged in the Thirteenth Judicial District in and for Yellowstone County, Montana, with three counts of attempted sexual assault. As a basis for the charges, the information alleged that on November 25, 1992, Fuller drove his car close to three minor girls, stopped the car, said "let's do it," licked his lips, and told one of the girls

that she had a "nice butt." Fuller was convicted by a jury on all three counts and thereafter sentenced by the district court to three concurrent ten-year sentences, all of which were subject to suspension upon Fuller's complying with certain conditions. One of these conditions required him to participate in an outpatient sex offender treatment program and to follow all policies of that program. (App. 3a.)

Fuller was accepted into the program prior to sentencing on the basis of an evaluation in which he was required to disclose honestly his offending history. Fuller was also required to disclose honestly his offending history as part of the treatment program itself. Consequently, if he failed to disclose honestly his offending history at the admission stage or later during actual therapy, Fuller was subject to termination from the program.

Fuller did not comply with the condition that, in connection with the admission process for the therapy program, he disclose his prior offending history. Instead, after sentencing he revealed during treatment five other incidents of sexual misconduct, including intercourse, against five different child victims dating back to 1987. Fuller's counselor reported these incidents to authorities as required by Montana law. Mont. Code Ann. § 41-3-201 (1993). Following an investigation, Fuller was charged with one count of sexual intercourse without consent and two counts of sexual assault. (App. 4a.)

Fuller moved to dismiss the charges and to suppress introduction of his statements on the ground that they

were obtained in violation of his right against self-incrimination under the United States and Montana Constitutions. The issue was presented to the district court on stipulated facts. The court denied the motions, concluding that Fuller was not compelled to make the disclosures because he was free to assert the privilege without penalty and that the privilege therefore was not self-executing under *Minnesota v. Murphy*, 465 U.S. 420 (1984). The court noted that the parties cited state and federal authority construing the Fifth Amendment only, and that Montana's constitutional provision was not specifically addressed. The court therefore presumed that the parties perceived no differences between the federal provision and the Montana Constitution. (App. 10c.)

Fuller appealed these rulings to the Montana Supreme Court. Applying its view of *Murphy*, the supreme court reached a result directly opposed to the trial court's. Even though Fuller was never "expressly" threatened with punishment for relying on the Fifth Amendment, the court found a threat "implicit" in the requirement that Fuller honestly disclose his offending history in sex offender treatment. (App. 11a-12a.)

The Montana Supreme Court distinguished *Murphy* as follows:

> In *Murphy*, "[t]he state court did not attempt to define the precise contours of Murphy's obligation to respond to questions. Murphy's probation condition proscribed only false statements; it said nothing about his freedom to decline to answer particular questions. . . . " In the case at bar, Fuller's obligation was clearly and precisely set out. He was required to disclose his offense

> history in order to maintain his place in the treatment program and avoid being sent to prison. Fuller was directly ordered to incriminate himself; this is a condition far removed from the general obligation to be truthful that constrained Murphy. Simply put, the State gave Fuller two choices: disclose, or go to prison.

App. 13a (citation omitted). It thus concluded that Fuller had been placed in the classic "penalty" situation rendering the Fifth Amendment self-executing and that the State could not use the information elicited in a subsequent prosecution. (App. 17a.) The court concluded its opinion by stating that its decision was "also based separately and independently" on the right to remain silent pursuant to article II, section 25 of the Montana Constitution. (*Id.*) However, it engaged in no separate analysis of the state constitutional issue, instead determining the privilege issue under the Montana Constitution with reference to its understanding of *Murphy* and related decisions from this Court. Fuller's prosecution before the state district court has been stayed pending action on this petition.

REASONS FOR GRANTING THE WRIT

The petition should be granted because the Montana Supreme Court's ruling rests on a clear misapprehension of this Court's Fifth Amendment jurisprudence and, at least in Montana, will discourage substantially, if not end, the use of sex offender treatment programs as a sentencing alternative. Giving a convicted sex offender the option of remaining in the community on the condition

that he honestly disclose his offending history may present a difficult choice, but it does not equate with "compulsion" for purposes of the Fifth Amendment.

The Montana Supreme Court's reliance on *Minnesota v. Murphy*, 465 U.S. 420 (1984), for a different conclusion is plainly wrong. Rather than being distinguishable from *Murphy*, this case is virtually identical not only because Fuller was never told that assertion of his Fifth Amendment privilege against self-incrimination would result in probation revocation but also because, had his probation been revoked for reasons related to nondisclosure, the revocation would have derived from his failure to maintain his position in the sex offender program. Like the probationer in *Murphy*, therefore, probation revocation would have been predicated on failure to comply with an admittedly valid condition of probationer status – here participation in the therapy program.

The Montana Supreme Court's decision, finally, has profound implications for any court-ordered program which utilizes acceptance of criminal responsibility as the basis of treatment. If criminal conduct that comes to light during therapy cannot be acted upon by prosecutors as deemed appropriate for public safety purposes, such programs' use as an alternative to imprisonment will be curtailed greatly. Prosecutors cannot risk the possibility that persons like Fuller will avail themselves of silence at the time they are evaluated, then claim that they were impermissibly "compelled" to speak as part of treatment in order to avoid future criminal liability.

I. This Court Has Never Required the Government to Make Exercise of the Fifth Amendment Privilege Cost-Free.

This Court has recognized consistently that the criminal justice system may lawfully create disincentives for the exercise of the Fifth Amendment privilege. *See Jenkins v. Anderson*, 447 U.S. 231 (1980) (a defendant's prearrest decision to exercise his Fifth Amendment privilege rather than go to the police may be used to impeach his testimony at trial, despite the fact that assertion of the privilege might be discouraged as a result); *Williams v. Florida*, 399 U.S. 78 (1970) (a defendant may be compelled to disclose to the government the substance of his alibi defense prior to trial, despite the potential that such a rule forces the defendant to provide information that could assist the State in convicting him). In these respects, "the Constitution does not forbid 'every government-imposed choice in the criminal process that has the effect of discouraging the exercise of constitutional rights.' " *Jenkins*, 447 U.S. at 236 (quoting *Chaffin v. Stynchcombe*, 412 U.S. 17, 30 (1973)); *see also McGautha v. California*, 402 U.S. 183, 213 (1971). The Montana Supreme Court's decision conflicts with these cases because it construes any choice put to a criminal defendant, which has the incidental effect of encouraging a waiver of the Fifth Amendment, as a "penalty" for assertion of the right.

Perhaps most analogous to the present case is the defendant who is offered a lenient sentence in exchange for a guilty sentence requiring him to waive numerous constitutional rights including the right to remain silent. This Court nonetheless has reaffirmed unequivocally the validity of plea bargaining, despite its "discouraging

effect" on assertion of the latter privilege and other rights. *See Corbitt v. New Jersey*, 439 U.S. 212 (1978); *Bordenkircher v. Hayes*, 434 U.S. 357 (1978); *Brady v. United States*, 397 U.S. 742 (1970).

A defendant who is offered a suspended sentence in exchange for his participation in sex offender treatment faces a similar situation: He must decide whether to accept the offer of leniency with the concomitant limitation on his ability to assert the privilege as a condition of that offer of leniency, or to decline the offer and retain the full benefit of the privilege, thereby resigning himself to what he may perceive more severe, immediate punishment. This may present a difficult choice, but it does not create the degree of compulsion which would render the Fifth Amendment privilege self-executing.

The same would be true for a defendant who is accepted into the program, then refuses to comply with the requirement of honest disclosure. The act of revoking probation is simply a legitimate, indeed an essential, response to the defendant's failure to demonstrate his continued qualification for lenient treatment. So viewed, probation revocation does not constitute a "penalty" in the same sense that loss of employment or an economic sanction is a "penalty." Rather, it is simply a reinstatement of defendant's original prison sentence imposed for the crimes he committed.

This Court has held that the Fifth Amendment privilege is not implicated when a person's claim to a government benefit is rejected because his assertion of the privilege prevents him from establishing his entitlement to that benefit. *E.g., United States v. Rylander*, 460 U.S. 752

(1983); *Kimm v. Rosenburg*, 363 U.S. 405 (1960) (per curiam); *Orloff v. Willoughby*, 345 U.S. 83 (1953). By the same token, a defendant whose probation is revoked is incarcerated not because he refused to admit his guilt, but because he has failed to comply with the obligations imposed by a previous order of the sentencing court which he had to satisfy in order to maintain his status as a probationer. These are obligations which the probationer chose to accept in exchange for an offer of leniency in sentencing. A probationer who desires the protection of the Fifth Amendment privilege must therefore assert it, recognizing that the consequence is part of the arrangement which he entered into.

In order to further the penal and rehabilitative goals of sex offender treatment, the privilege should be considered self-executing only where the State's sole objective is to penalize the assertion of a constitutional right. *See Bordenkircher v. Hayes*, 434 U.S. at 363 (citations omitted); *Chaffin v. Stynchcombe*, 412 U.S. at 30, 33 n.20 (1973). Where, as here, acceptance of responsibility is required in order to qualify for lenient sentencing treatment, the State's objective is neither to gather evidence of guilt for future prosecutions nor to penalize the assertion of the privilege, but rather to serve valid penal considerations which favor lenient treatment of convicted sex offenders who acknowledge their prior criminal conduct and seek treatment to help them avoid reoffending. This objective is threatened if probationers are afforded prosecutorial immunity for any statements made during the course of treatment. The State must be able to use the threat of probation revocation for assertion of the privilege if it is

to administer its treatment programs. This cannot be construed as punishment because the probationer voluntarily accepts that limitation as a condition of his suspended sentence. The compulsion necessary to render the privilege self-executing is therefore absent. Without any other type of coercion, the probationer's statements must be considered voluntary and may be used against him in a subsequent criminal prosecution.[1]

II. The Montana Supreme Court Misread *Minnesota v. Murphy.*

As a general rule, a person desiring the protection of the privilege against self-incrimination must affirmatively assert it or any answers given will not be deemed to have been "compelled" within the meaning of the Fifth Amendment. *United States v. Monia,* 317 U.S. 424 (1943).

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[1] During oral argument before this Court in an earlier case, former Attorney General Racicot stated his belief that a probationer in Montana would enjoy immunity from prosecution for incriminating statements made during court-ordered therapy. *See Montana v. Imlay,* 113 S. Ct. 444 (1992) (per curiam) (Stevens, J., concurring). As noted by Justice White in his dissenting opinion, it was not clear whether General Racicot's "concession" reflected a possible misunderstanding of *Minnesota v. Murphy,* 465 U.S. 420 (1984), or whether it was an "unequivocal and unconditional declaration of its own future prosecutorial policy." *Imlay,* 113 S. Ct. at 446 (White, J., dissenting). To the extent that the statement reflected a declaration of prosecutorial policy, Petitioner would simply point out that the policy has changed, as evidenced by the present case. To the extent that former General Racicot's statement reflected a misunderstanding of *Murphy,* Petitioner would urge this Court to use this opportunity to clarify *Murphy.*

In a series of decisions known as the "penalty" cases, however, this Court recognized an exception to the general rule where government imposes direct burdens on the exercise of the privilege and thereby forecloses a free choice to remain silent. *E.g., Lefkowitz v. Cunningham,* 431 U.S. 801 (1977) (removal from political office if privilege asserted); *Garner v. United States,* 424 U.S. 648 (1976) (privilege not self-executing with respect to disclosures on income tax returns); *Uniformed Sanitation Men Ass'n v. Commissioner of Sanitation,* 392 U.S. 280 (1968) (discharge from employment for invoking privilege). Under these circumstances, failure to assert the privilege is excused because the privilege is deemed self-executing. *Garrity v. New Jersey,* 385 U.S. 493, 498-99 (1967).

In *Minnesota v. Murphy,* 465 U.S. 420 (1984), this Court held that a probationer who was required to be truthful with his probation officer "in all matters" did not face a classic penalty situation because the State had not "attempted to attach an impermissible penalty to the exercise of the privilege against self-incrimination." *Id.* at 437. In a more general discussion concerning the parameters of the Fifth Amendment privilege in the probation context, the Court reasoned:

> A State may require a probationer to appear and discuss matters that affect his probationary status; such a requirement, without more, does not give rise to a self-executing privilege. The result may be different if the questions put to the probationer, however relevant to his probationary status, call for answers that would incriminate him in a pending or later criminal prosecution. There is thus a substantial basis in our cases for concluding that if the State, either

> expressly or by implication, asserts that invocation of the privilege would lead to revocation of probation, it would have created the classic penalty situation, the failure to assert the privilege would be excused, and the probationer's answers would be deemed compelled and inadmissible in a criminal prosecution.

Id. at 435 (footnote omitted). Both the explicit holding and the broader rationale underlying it thus identified as critical imposition of a sanction for asserting the ***privilege*** – an element missing when, as in *Murphy*, a sanction is meted out because of failure to comply with an otherwise valid condition of probation.

Respondent's situation was substantively identical to the probationer's in *Murphy*. Fuller was required to follow all policies of his treatment program, which included honest disclosure of his offending history. The requirement of honest disclosure, however, did not equate with an explicit or implicit threat that assertion of the Fifth Amendment privilege would result in Fuller's incarceration. Fuller remained completely free to assert his Fifth Amendment privilege but, in so doing, jeopardized his position in the treatment program because an integral aspect of the associated therapy was complete disclosure of his sex-offender conduct, regardless of whether it was related to the crimes for which he had been sentenced.

The Montana Supreme Court's conclusion that "[a] command to speak, under threat of loss of liberty, implicitly forecloses the option of remaining silent" accordingly was incorrect. Here there was no "command." The district court in the first criminal proceeding simply gave Fuller a choice. He remained free at all times to assert his

Fifth Amendment privilege if he desired protection from future prosecution. The collateral consequence of such action likely would have been termination from the program and subsequent probation revocation, but Fuller nevertheless was free to choose whether to risk revocation by imperiling his position in the treatment program or to chance future prosecution on the basis of disclosures made to his therapist. In sum, there was no "compulsion" which would render the Fifth Amendment self-executing; there instead was a straightforward arrangement under which Fuller agreed to conduct himself in certain ways to avoid incarceration for the crimes of which he had been convicted.[2]

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[2] It bears mention that the Montana Supreme Court's confusion is not unique. Other courts which have considered the issue have come to differing conclusions under comparable circumstances. *See State v. Tenbusch*, 886 P.2d 1077 (Or. Ct. App. 1994) (probation conditions which required the probationer to take a polygraph and truthfully answer questions about his sexual history did not constitute a threat by the state to penalize him for invoking the privilege so that there was no "compulsion" for Fifth Amendment purposes); *Husske v. Commonwealth*, 448 S.E.2d 331 (Va. Ct. App. 1994), *opinion withdrawn*, 462 S.E.2d 120 (Va. Ct. App. 1995) (probationer whose refusal to answer questions would be inconsistent with mental health treatment plan which was a condition of suspended sentence is in classic penalty situation); *Mace v. Amestoy*, 765 F. Supp. 847 (D. Vt. 1991) (invalidating any attempt by the State to condition probation on waiver of Fifth Amendment privilege, thereby invalidating the state court decision in *State v. Mace*, 578 A.2d 104 (Vt. 1990); *see also State v. Eccles*, 877 P.2d 799 (Ariz. 1994); *Gyles v. State*, 901 P.2d 1143 (Alaska Ct. App. 1995); *State v. Post*, 826 P.2d 172 (Wash.), *modified*, 837 P.2d 599 (1992); *People v. Dyla*, 536 N.Y.S.2d 799 (N.Y. App. Div. 1988).

III. The Montana Supreme Court's Decision Has Profound Implications for the Use of Sex Offender Treatment as an Alternative to Imprisonment.

Child sexual abuse is a major social problem in the United States, and the number of such cases continues to increase dramatically. B. Smith et al., *The Probation Response to Child Sexual Abuse Offenders: How Is It Working?* (Amer. Bar Ass'n, Crim. Justice Sec., 1990). Currently, the primary response of courts is to sentence the defendant to probation and require the offender to participate in sex offender treatment. *Id.* Recognizing that sex offenders cannot be "cured," current treatment models focus on techniques designed to help offenders control a life-long tendency toward deviant behavior, thereby preventing relapse. W. Pithers, *Relapse Prevention With Sexual Aggressors: A Method for Maintaining Therapeutic Gain and Enhancing External Supervision, in Handbook of Sexual Assault: Issues, Theories, and Treatment of the Offender* (W. Marshall et al. eds., 1990). Admission of guilt and acceptance of criminal responsibility is a basic requirement for meaningful participation in treatment. B. Schwartz & H. Cellini, *The Sex Offender*, 10-4 to 10-6 (1995).

Although there is debate over whether sex offender treatment actually reduces recidivism, P. Finn, *Do Sex Offender Treatment Programs Work?*, 78 Judicature No. 5 (Mar.-Apr. 1995), the importance of monitoring the probationer's behavior in the community cannot be denied. This Court has recognized that "the prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance." *New York v. Ferber*, 458 U.S. 747, 757 (1982). Research and clinical experience both suggest that sexual offending is a highly

compulsive and repetitive behavior. A. Salter, *Transforming Trauma* 13 (1995). Typically, the offense for which the offender is caught is by no means his first sexual assault.[3] Studies have also shown that sex offenders commit an extensive number of nonsexual crimes as well. *Id.* at 33.

Given these statistics, prosecutors and judges who are considering a probationary sentence for a convicted sex offender must weigh the benefits of community-based treatment with the risk posed to public safety. In order to maintain an appropriate balance, the State must have the ability to react if public safety is threatened, i.e., if the offender is actively reoffending or discloses additional offenses which suggest that he should be incarcerated rather than on the streets. In Fuller's case, it became apparent only after he was admitted into treatment that his level of sexual deviancy was far more serious than originally suspected.

By affording what amounts to use immunity to offenders once they are in treatment, the Montana Supreme Court effectively has destroyed the Petitioner's ability to act later in the interest of public safety. This in turn will threaten the use of community-based sex offender treatment as an alternative to imprisonment. Prosecutors and judges simply cannot risk the possibility

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[3] In the most comprehensive study conducted in this area, a sample of 561 sex offenders reported that they had completed a total of 291,737 paraphilic acts with a total of 195,407 victims. The subgroup of 377 extrafamilial child molesters in the sample were responsible for 48,297 acts against a total of 27,416 victims. The 203 incest offenders in the group committed 15,668 acts against 361 victims. *Id.* at 10.

that persons like Fuller, through their own manipulation of the process, can remain at large notwithstanding their clear societal threat.

IV. The Montana Supreme Court's Decision, Although It Cites the State Constitution, Misconstrues Federal Law and Therefore Gives Rise to This Court's Jurisdiction.

One jurisdictional issue deserves mention. The Montana Supreme Court's decision cites both federal and state constitutional law, raising the question of whether its judgment is supported by independent and adequate state law grounds. This Court's decisions support the existence of jurisdiction to review this judgment.

The Montana Supreme Court's opinion contains three references to article II, section 25 of the Montana Constitution, the state law counterpart to the Fifth Amendment. In its introduction of the question presented, the court observed that the privilege against self-incrimination exists under both the Montana and the federal constitutions, and "[a]ccordingly, the resolution of Fuller's appeal will rest on Article II, Section 25 of the Montana Constitution, as well as the United States Supreme Court's interpretation of the Fifth Amendment." (App. 5a.) The court then stated the issue and quoted both the Montana and federal constitutional provisions. *Id.* Finally, after stating its holding, the court added:

> While we have devoted considerable time to a lengthy discussion of the application of the Fifth Amendment to the United States Constitution, it is to be noted that this holding is also based separately and independently on Fuller's right

> to remain silent pursuant to Article II, Section 25 of the Montana Constitution.

Id. at 17a. Between the second and third of these references, the court cited six of this Court's Fifth Amendment decisions, and no cases indicating the existence of an idiosyncratic rule of state law under article II, section 25 of the Montana Constitution.[4] The court referred to the Fifth Amendment no fewer than twenty-three times, the last of which is found in the court's statement of its holding:

> Because the State improperly compelled Fuller to disclose past criminal acts *in violation of his Fifth Amendment privilege against self-incrimination* and his constitutionally guaranteed right to remain silent, it is prohibited from using any of the information elicited as the basis for a later, separate prosecution. Therefore, the District Court erred in denying Fuller's motion to dismiss on these grounds.

Id. (emphasis added).

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[4] The only state case cited in the opinion's discussion of the issue is *State v. Imlay*, 813 P.2d 979 (Mont. 1991), *cert. dismissed*, 113 S. Ct. 444 (1992). However, the Montana Supreme Court cited *Imlay* only as evidence of the presence or absence of coercion, and not as authority for the existence of a rule of State constitutional law broader than that which exists under the Fifth Amendment. (App. 14a-15a; *cf.* App. 30a-32a (Nelson, J., dissenting) (arguing that Fuller could not have been coerced into speaking because *Imlay* prevented the State from revoking his probation based on his assertion of Fifth Amendment privilege). Indeed, *Imlay* itself was grounded in the Montana Supreme Court's application, rightly or wrongly, of federal constitutional principles.

This Court conclusively presumes the existence of a federal question in cases such as the one at bar, where "a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion." *Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983). This case is factually indistinguishable from *Long* with respect to the existence of jurisdiction. Here, as in *Long*, the state court indicated that its holding was supported by both the federal and the analogous state constitutional provisions. *Compare* App. 5a, 17a, *with People v. Long*, 320 N.W.2d 866, 869 n.4, 870 (Mich. 1982) (stating that the issue was discussed and decided under both federal and state constitutions). However, the Montana Supreme Court's actual legal analysis, like that of the Michigan Supreme Court in *Long*, relied exclusively on federal precedent. *See also Florida v. Riley*, 488 U.S. 445, 448 n.1 (1989) (finding jurisdiction where "the bulk of the discussion . . . focused exclusively on federal cases"). The Montana Supreme Court's holding, like that of the Michigan Supreme Court, was also expressed with reference to the federal constitution. *Compare* App. 5a and 17a, *with Long*, 320 N.W.2d at 869 (lower court decision reversed because the court "erroneously applied the principles of *Terry v. Ohio* [392 U.S. 1 (1968)]").

Finally, it appears indisputable that the Montana Supreme Court's decision was driven by its misunderstanding of the controlling principles of federal constitutional law. This case was decided against the backdrop of a long-standing tradition of Montana Supreme Court

decisions holding that the protections against self-incrimination accorded by article II, section 25 of the Montana Constitution are coextensive with those provided by the Fifth Amendment. *State v. Jackson*, 672 P.2d 255, 260 (Mont. 1983); *State v. Finley*, 566 P.2d 1119, 1121 (Mont. 1977); *State v. Armstrong*, 552 P.2d 616, 619 (Mont. 1976); *see also State v. Finley*, 915 P.2d 208, 223-24 (1996) (Leaphart, J., dissenting) (acknowledging continued vitality of *Jackson* holding).[5] The court's opinion clearly shows that it was led to the conclusion it reached by its understanding of the federal constitutional principles underlying this Court's decision in *Minnesota v. Murphy, supra*, and not by any independent rule of state constitutional law. Where applicable state and federal constitutional protections have been held by the state courts to be coextensive and the state court chooses to analyze the issue primarily under federal law, this Court has consistently rejected the view that an *independent* state law ground supports the state court judgment. *Pennsylvania v. Muniz*, 496 U.S. 582, 588 n.4 (1990) (finding jurisdiction where state court

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[5] The court has explained its holding in *Jackson* as resting on the fact that the provisions of article II, section 25 and the Fifth Amendment are textually virtually identical. *State v. Solis*, 693 P.2d 518, 521 (1984), *see also Jackson*, 672 P.2d at 260 (Morrison, J., concurring) (Montana Supreme Court should be bound by federal precedent in construing language in Montana Constitution similar to federal provisions); *but see State v. Johnson*, 719 P.2d 1248, 1254 (Mont. 1986) (Montana Supreme Court "refuse[s to] march lockstep with the United States Supreme Court where constitutional issues are concerned, even if the applicable State Constitution provisions are identical or nearly identical to those of the United States Constitution").

opinion cites state constitutional provision with protections identical to those provided by federal constitution); *Maryland v. Garrison*, 480 U.S. 79, 83-84 (1987) (finding jurisdiction where state constitutional provision construed by state court in pari materia with federal provision); *see Long*, 463 U.S. at 1044-45 n.10 (holding in the alternative that state law ground not independent because, for purposes of the specific issue presented, provisions of the Michigan Constitution had been held by the Michigan courts to be coextensive with the Fourth Amendment).

CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted.

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August 1996

APPENDIX A

No. 95-343

IN THE SUPREME COURT OF THE
STATE OF MONTANA 1996

STATE OF MONTANA,

Plaintiff and Respondent,

v.

(Filed
Apr. 16, 1996)

MATTHEW C. FULLER,

Defendant and Appellant.

APPEAL FROM: District Court of the Thirteenth Judicial District, In and for the County of Yellowstone, The Honorable Robert W. Holmstrom, Judge presiding.

COUNSEL OF RECORD:

For Appellant:

Gary E. Wilcox, Billings, Montana

For Respondent:

Joseph P. Mazurek, Attorney General, Jennifer Anders, Assistant Attorney General; Dennis Paxinos, Yellowstone County Attorney, John Kennedy, Deputy Yellowstone County Attorney

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Heard and Submitted: January 11, 1996

Decided: April 16, 1996

Filed:

/s/ Ed Smith
Clerk

Justice William E. Hunt, Sr. delivered the Opinion of the Court.

Appellant Matthew C. Fuller (Fuller) was charged in the Thirteenth Judicial District Court, Yellowstone County, with rape and sexual assault. Fuller moved to dismiss the charges, alleging that the State violated his constitutionally guaranteed privilege against compelled self-incrimination. After the District Court denied his motion, Fuller pled guilty to the charges. Fuller appeals the District Court's denial of his motion to dismiss. We reverse.

ISSUE

Fuller raises two issues on appeal:

1. Did the District Court err in refusing to grant Fuller's motion to dismiss because the State impermissibly violated his constitutionally guaranteed privilege against compelled self-incrimination?

2. Did the District Court err in refusing to grant Fuller's motion to dismiss because his conviction offended the "fundamental fairness" doctrine set out in *State v. Theil* (1989), 263 Mont. 63, 768 P.2d 343?

Due to the resolution of the first issue, we do not find it necessary to address the second.

FACTS

The parties stipulated to the facts in this case.

On December 9, 1992, Fuller was charged with three counts of attempted sexual assault. After a bench trial, the District Court found Fuller guilty of all three counts. The District Court suspended Fuller's sentence but required, among other things, that he "obtain and/or continue his enrollment and participation in [an] outpatient Sex Offender Treatment Program" and "follow all policies of that program." In September 1994, this Court reversed the attempt convictions for lack of evidence, and ordered Fuller to be acquitted of the charges. See *State v. Fuller* (1994), 266 Mont. 420, 880 P.2d 1340.

After his 1992 conviction but prior to the 1994 reversal, Fuller was accepted into a treatment program in Billings. Patients are not admitted into the treatment program if they are in denial or do not honestly disclose their offense history. Further, patients will be terminated from the program if dishonesty or denial occur during their treatment, if they re-offend during treatment, or if they otherwise break the rules of the treatment program.

The employees of the treatment center are required to report to the authorities any evidence they possess about past or present offenses committed by individuals in the treatment program. Offenders who enter the treatment program are required to fully disclose their offense histories.

During treatment, Fuller prepared and presented to his treatment group an offense history which disclosed several past offenses, including the three at issue here,

each of which involved a different prepubescent girl. On March 30, 1994, the treatment program contacted the Probation and Parole Department (the Department) to notify it that Fuller had violated treatment policies. In accordance with its statutory duty, the treatment program also informed the Department of the three prior offenses Fuller had revealed during treatment. The Department in turn notified the Billings Police Department. Fuller subsequently was arrested for unrelated violations of probation.

On April 14, 1994, the State petitioned the District Court to revoke Fuller's suspended sentence. The grounds for revocation did not include the charges which are the basis of the instant appeal. The District Court revoked the suspended sentence and remanded Fuller to the custody of the Montana State Prison.

Meanwhile, the Billings Police Department investigated the incidents Fuller had revealed in treatment and took statements. No investigation had occurred prior to the police department receiving the information obtained from the treatment center. On the basis of the police investigation, Fuller was charged with one count of sexual intercourse without consent and two counts of sexual assault. He moved to dismiss the charges, alleging that the State's actions violated his constitutional privilege against compelled self-incrimination. The District Court denied the motion. Fuller then pled guilty to the charges, but specifically reserved his right to appeal the denial of his motion. It is that appeal which we decide today.

STANDARD OF REVIEW

The grant or denial of a motion to dismiss is within the sound discretion of the trial court and will not be disturbed unless an abuse of that discretion is shown. *State v. Barker* (1993), 260 Mont. 85, 89, 858 P.2d 360, 362-63 (citing *State v. Laster* (1986), 223 Mont. 152, 724 P.2d 721).

Whether or not a defendant's privilege against compelled self-incrimination is triggered is a conclusion of law. "Our standard of review of a district court's conclusions of law is plenary. We determine whether the district court's conclusions are correct." *State v. Sage* (1992), 255 Mont. 227, 229, 841 P.2d 1142, 1143 (citing *Steer, Inc. v. Dept. of Revenue* (1990), 245 Mont. 470, 803 P.2d 601).

Fuller alleges that his privilege against compelled self-incrimination was violated. This right is guaranteed to all citizens under both the Montana Constitution and the Fifth Amendment to the United States Constitution. Accordingly, the resolution of Fuller's appeal will rest on Article II, Section 25 of the Montana Constitution, as well as the United States Supreme Court's interpretation of the Fifth Amendment.

DISCUSSION

Did the District Court err in refusing to grant Fuller's motion to dismiss because the State impermissibly violated his constitutionally guaranteed privilege against compelled self-incrimination?

Montana residents are protected from compelled self-incrimination under both the Montana and the United

States Constitutions. Article II, Section 25 of the Montana Constitution provides that "no person shall be compelled to testify against himself in [a] criminal proceeding." The Fifth Amendment to the United States Constitution similarly provides that no person "shall be compelled in any criminal case to be a witness against himself."

All citizens enjoy this constitutional protection, regardless of who they are or how they are situated. It extends beyond trial or custodial situations, because "the [Fifth Amendment] privilege does not turn upon the type of proceeding in which its protection is invoked, but upon the nature of the statement or admission and the exposure which it invites." *Estelle v. Smith* (1981), 451 U.S. 454, 462, 101 S.Ct. 1866, 1873, 68 L.Ed.2d 359 (quoting *In re Gault* (1967), 387 U.S. 1, 49, 87 S.Ct. 1428, 1455, 18 L.Ed.2d 527). Accordingly, the privilege extends to those already convicted of a crime. *Minnesota v. Murphy* (1984), 465 U.S. 420, 426, 104 S.Ct. 1136, 1141-42, 79 L.Ed.2d 409 (citing *Baxter v. Palmigiano* (1976), 425 U.S. 308, 96 S.Ct. 1551, 47 L.Ed.2d 810).

The language of the Fifth Amendment speaks of "compulsion." Therefore, if the State has not *compelled* the defendant to respond, the Fifth Amendment privilege does not attach. "[A] general obligation to appear and answer questions truthfully [does] not convert otherwise voluntary statements into compelled ones." *Murphy*, 465 U.S. at 427.

A person claiming the protection of the Fifth Amendment generally must affirmatively invoke it. *United States v. Monia* (1943), 317 U.S. 424, 427, 63 S.Ct. 409, 410-11, 87 L.Ed.2d 376. This duty to claim the privilege remains

with the individual even when the government is unquestionably attempting to compel a response. "[I]f a witness under compulsion to [answer] makes disclosures instead of claiming the privilege, the government has not 'compelled' him to incriminate himself." *Garner v. United States* (1976), 424 U.S. 648, 654, 96 S.Ct. 1178, 1182, 47 L.Ed.2d 370. Moreover, a defendant's ignorance of his Fifth Amendment rights generally will not excuse his failure to claim the privilege. An individual may lose the benefit of the privilege without making a knowing and intelligent waiver; if he simply fails to assert the privilege, it will be deemed waived. *Garner*, 424 U.S. at 654; *Maness v. Meyers* (1975), 419 U.S. 449, 466, 95 S.Ct. 584, 595, 42 L.Ed.2d 574.

In this case, Fuller never asserted his Fifth Amendment privilege, or, pursuant to it, refused to answer. Instead, he fully and honestly answered the questions put to him by the treatment program, in accordance with the District Court's order. If our inquiry ended here, Fuller would be precluded from assigning error to the District Court's denial of his motion to dismiss.

There is an exception, however, to the general rule that a defendant must affirmatively invoke the privilege in order to enjoy its protections. Failure to invoke the privilege does not preclude the benefit if the defendant is placed in a situation where he is not "free to admit, deny, or refuse to answer." *Murphy*, 465 U.S. at 429 (citing *Garner*, 424 U.S. at 657). In such cases, a defendant's privilege against self-incriminating [sic] is said to be "self-executing." The United States Supreme Court has applied this exception to three different types of cases.

First, the Supreme Court has held that gamblers may exercise their Fifth Amendment privilege against self-incrimination by refusing to file a federal income tax return. "In recognition of the pervasive criminal regulation of gambling activities and the fact that claiming the privilege in lieu of filing a return would tend to incriminate, the [Supreme] Court has held that the privilege may be exercised by failing to file." *Murphy*, 465 U.S. at 439 (citing: *Marchetti v. United States* (1968), 390 U.S. 39, 88 S.Ct. 697, 19 L.Ed.2d 889; *Grosso v. United States* (1968), 390 U.S. 62, 88 S.Ct. 709, 19 L.Ed.2d 906; *Mackey v. United States* (1971), 401 U.S. 667, 91 S.Ct. 1160, 28 L.Ed.2d 404).

Second, the Supreme Court has held that an individual subject to a custodial interrogation must be formally advised of his Fifth Amendment right to remain silent. *Miranda v. Arizona* (1966), 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694. The Supreme Court reasoned that a government agency conducting such an interrogation is aware that the responses elicited are likely to be incriminatory. Further, the isolation and intimidating atmosphere inherently found in police custody, whether intentional or not, might undermine the individual's will and compel him to speak when he would otherwise be silent. *Murphy*, 465 U.S. at 430. Therefore, the Supreme Court has placed upon the government the affirmative duty to inform a suspect of his right to remain silent before questioning him. *Miranda*, 384 U.S. at 498. However, "this extraordinary safeguard does not apply outside the context of the inherently coercive custodial interrogations for which it was designed." *Murphy*, 465 U.S. at 430 (quoting *Roberts v. United States* (1980) 445 U.S. 552, 560, 100 S.Ct. 1358, 1364, 63 L.Ed.2d 622).

Third, the Supreme Court has held that an individual need not formally invoke the privilege if the government prevents a voluntary invocation of the Fifth Amendment by threatening to penalize the individual should he or she invoke it. *Murphy,* 465 U.S. at 434 (citing *Garner,* 424 U.S. at 661). This foreclosure of access to the Fifth Amendment is termed a "classic penalty situation." In *Murphy,* the Supreme Court further explained the classic penalty situation:

> The threat of punishment for reliance on the privilege distinguishes cases of the sort from the ordinary case in which a witness is merely required to appear and give testimony. A State may require a probationer to appear and discuss matters that affect his probationary status; such a requirement, without more, does not give rise to a self-executing privilege. The result may be different if the question put to the probationer, however relevant to his probationary status, calls for answers that would incriminate him in a pending or later criminal prosecution. There is thus a substantial basis in our cases for concluding that if the State, *either expressly or by implication,* asserts that invocation of the privilege would lead to revocation of probation, it would have created the classic penalty situation, the failure to assert the privilege would be excused, and the probationer's answers would be deemed compelled and inadmissible in a criminal prosecution.

Murphy, 465 U.S. at 435, (fn. omitted, emphasis added).

Fuller claims the State placed him in a classic penalty situation. He consequently asserts that his failure to invoke the Fifth Amendment should be excused, and that

the State is prohibited from using any disclosure made in treatment in a subsequent prosecution. We therefore must evaluate whether the requirements demanded of Fuller by the District Court placed him in a classic penalty situation.

The District Court ordered Fuller to "obtain and/or continue his enrollment and participation in the outpatient Sex Offender Treatment Program . . . [and to] follow all policies of that program. . . . " If he failed to comply, his probation would be revoked and he would be sent to prison. The policies of the treatment program required that he fully and honestly disclose his offense history. Again, if he failed to do so, his probation would be revoked and he would be sent to prison. It is therefore undisputed that the State compelled Fuller to divulge past activities which it knew would be criminal.

It is further undisputed that the information divulged by Fuller was self-incriminatory. On the basis of the offense history disclosed, and on that basis alone, Fuller was charged and convicted of three additional crimes.

The State insists these circumstances did not rise to the level of a classic penalty situation because the District Court never threatened to punish Fuller for exercising his Fifth Amendment right. At any time, the State argues, Fuller could have invoked his privilege against self-incrimination. Had he done so, the State further argues, the District Court could not have lawfully punished him for its invocation and his consequent refusal to speak.

While Fuller acknowledges that the District Court never expressly threatened to punish him for relying on

the Fifth Amendment, he argues that such a threat was implicit in its insistence that he speak or be punished. We agree. A command to speak, under threat of loss of liberty, implicitly forecloses the option of remaining silent.

We are therefore unable to imagine how the dissent can assert that the record does not support Fuller's position. The facts in this case are not in dispute; on the contrary, the parties stipulated to them, as we pointed out earlier in this opinion. In the stipulated facts, both parties conceded this issue and that portion of the stipulation is set out verbatim:

> [The District Court] signed a judgment and commitment order sentencing Fuller to ten years on each count to run concurrently. The execution of the sentence was suspended upon the performance by Fuller of certain conditions, [one] of which [was] the following: *the defendant shall obtain and/or continue his enrollment and participation in the out-patient sex offender treatment program* with a professional who is in compliance with the standards for treatment . . .
>
> After Fuller was first sentenced in January, 1994, he entered sexual offender treatment . . . prior to sentencing, a sexual offender evaluation was ordered by the District Court. Fuller was accepted into treatment prior to imposition of sentence.
>
> *Patients are not admitted into a treatment program if they are in denial or do not honestly disclose their offending history. Further, patients will be terminated from the program, if the same occurs during their treatment, they reoffend during treatment, or*

otherwise break the rules of the treatment programs. [Emphasis added.]

The District Court threatened to send Fuller to prison if he did not honestly disclose his offense history. It therefore threatened a real and significant punishment if he remained silent. The State explains that this threat only applied to unexplained silence, not to silence maintained pursuant to the Fifth Amendment. But it is too fine a distinction to expect an individual to differentiate between exercising a constitutional right to remain silent and merely remaining silent. The threat of punishment implicitly extended to both.

This decision is supported by the United States Supreme Court's interpretation of the Fifth Amendment as articulated in *Murphy*, even though the Supreme Court reached the opposite conclusion in that case. In *Murphy* the defendant's probation required, among other things, that he participate in a sex offender treatment program, that he report periodically to his probation officer, and that he "be truthful with the probation officer in all matters." *Murphy*, 465 U.S. at 422. After Murphy left the treatment program, a counselor called his probation officer and informed her that, while in treatment, Murphy had confessed to a rape and murder committed years earlier. When the probation officer confronted Murphy with the information obtained from the treatment counselor, he again confessed to the rape and murder. The probation officer forwarded the information to the police and Murphy was subsequently tried and convicted of the murder. *Murphy*, 465 U.S. at 422-25.

The Supreme Court found that Murphy had not claimed his Fifth Amendment privilege, and that his was not one of the three exceptional situations where the privilege is self-executing. Specifically, the Supreme Court found that Murphy was not placed in a classic penalty situation because the Minnesota probation revocation statute did not impermissibly foreclose a free choice to be silent. *Murphy*, 465 U.S. at 437. It therefore concluded that Murphy's Fifth Amendment privilege was not self-executing and, since he had not invoked it, that it was properly deemed to have been waived.

Factually, the case at bar is far different. In *Murphy*, "[t]he state court did not attempt to define the precise contours of Murphy's obligation to respond to questions. Murphy's probation condition proscribed only false statements; it said nothing about his freedom to decline to answer particular questions. . . . " *Murphy*, 465 U.S. at 437. In the case at bar, Fuller's obligation was clearly and precisely set out. He was required to disclose his offense history in order to maintain his place in the treatment program and avoid being sent to prison. Fuller was directly ordered to incriminate himself; this is a condition far removed from the general obligation to be truthful that constrained Murphy. Simply put, the State gave Fuller two choices: disclose, or go to prison.

The Supreme Court particularly acknowledged in *Murphy* that a proper Fifth Amendment analysis might lead to an opposite conclusion – that is, to a holding that the Fifth Amendment was in fact violated – if the defendant faced specifically incriminating questions rather than just a general obligation to be truthful. As we have already noted, the Supreme Court in *Murphy* held that

"[t]he result may be different if the question put to the probationer, however relevant to his probationary status, calls for answers that would incriminate him in a pending or later criminal prosecution." *Murphy*, 465 U.S. at 435. This is precisely what happened in this case, and precisely why we properly reach a conclusion opposite to that reached by the Supreme Court in *Murphy*.

The State points out, however, that in reality the District Court could not have revoked Fuller's probation for refusing to disclose his offense history, because this Court has found that it is unconstitutional to revoke probation for failure to admit to a criminal act. See *State v. Imlay* (1991), 249 Mont. 82, 813 P.2d 979, cert. granted, 112 S.Ct. 1260, cert. dismissed 113 S.Ct. 444 (1992). It therefore contends that there was no real prospect of sanctions if Fuller remained silent, despite Fuller's argument to the contrary. The dissent also devotes much energy to arguing that Fuller's interpretation of *Imlay* is incorrect.

The District Court threatened to revoke Fuller's probation if he did not remain in the treatment program and follow its policies, including disclosing his offense history. Fuller argued that the district court retained its power to carry out this threat, even in the face of the *Imlay* decision. The State contended, and the dissent agrees, that *Imlay* stands for the proposition that a district court does *not* have the ability to carry out such a threat.

On this point, the majority and dissent do not disagree. The holding in *Imlay* stands for the proposition that probation cannot be revoked solely on the ground that the defendant refuses to admit that he or she is guilty

of a crime. Therefore, the dissent's claim, that Fuller's reading of *Imlay* is incorrect, may well have some merit.

We do not minimize the potential importance of the *Imlay* decision in other cases; however, in this case, the holding in *Imlay* is largely irrelevant. The dissent emphasizes that the District Court, pursuant to *Imlay*, lacked the actual ability to carry out its threatened revocation of Fuller's probation if he chose to remain silent. But whether the District Court actually could have carried out its threat is beside the point. It is the issuance itself of a credible threat which is crucial. The District Court, presumably knowing that it could not revoke Fuller's probation if he refused to admit to past crimes (and such admissions are certainly what the phrase "offense history" contemplates), nevertheless threatened to do exactly that. Fuller cannot be faulted for taking the District Court at its word and acting accordingly.

Moreover, the reliance by the State and the dissent on the *Imlay* decision ignores the realities of Fuller's situation. He was under a court order to comply with the policies of the treatment program; he was told that if he failed to do so, his probation would be revoked. He believed the District Court had the authority and the ability to carry out its threat, and that belief was eminently reasonable. It is far less reasonable to expect him to know that the threat was an empty one.

The State next argues that this entire situation would never have arisen if Fuller had been honest with the State in plea negotiations, revealing the three previous crimes to the State or to the District Court at an earlier date. If

Fuller had disclosed the offenses earlier, however, presumably the State would have prosecuted him earlier. It has never been incumbent upon a defendant to assist the State in his own prosecution. Fuller's failure to do so is not relevant to the question of whether his Fifth Amendment privilege was violated.

Nor do we find Fuller's lack of knowledge of the particularities of this area of law to be "ludicrous," as the dissent apparently does. Considering that the learned members of the United States Supreme Court, the learned members of this Court, and a myriad of legal scholars cannot agree on the exact parameters of an individual's privilege against compelled self-incrimination, it would be ludicrous to expect a lay-person defendant to appreciate its intricacies. Every schoolchild may be familiar with the Fifth Amendment as a concept, as the dissent claims. That does not, however, translate to a widely-held understanding of its every nuance and subtlety.

Following the analysis set out in *Murphy,* the proper inquiry is "whether [a defendant's] probation conditions merely required him to appear and give testimony about matters relevant to his probationary status or whether they went further and required him to choose between making incriminating statements and jeopardizing his conditional liberty by remaining silent." *Murphy,* 465 U.S. at 436. This latter "required choice" is precisely and solely what the State offered in Fuller's case. This is "the extra, impermissible step" which serves to make the Fifth Amendment privilege self-executing. *Murphy,* 465 U.S. at 436.

Because the State improperly compelled Fuller to disclose past criminal acts in violation of his Fifth Amendment privilege against compelled self-incrimination and his constitutionally guaranteed right to remain silent, it is prohibited from using any of the information elicited as the basis for a later, separate criminal prosecution. Therefore, the District Court erred in denying Fuller's motion to dismiss on these grounds. While we have devoted considerable time to a lengthy discussion of the application of the Fifth Amendment to the United States Constitution, it is to be noted that this holding is also based separately and independently on Fuller's right to remain silent pursuant to Article II, Section 25 of the Montana Constitution.

We emphasize that this holding does not stand for the proposition that the State may not compel a defendant to answer. It can; indeed, in order for treatment to be effective, it must, because a defendant who refuses to disclose his offense history cannot be successfully treated. However, if the State chooses to compel answers to incriminating questions, it cannot use those answers against the defendant in a later criminal proceeding.

Judgment reversed.

/s/ William E. Hunt Sr
Justice

We Concur:

Chief Justice

/s/ W. William Leaphart

Justices

Justice Terry N. Trieweiler concurring.

I concur with the majority opinion and all that is included in its discussion. I write separately to respond to the dissenting opinion which seems to unnecessarily confuse what should be a straightforward application of clear constitutional principles.

The Fifth Amendment of the United States Constitution provides in relevant part that "[n]o person shall be . . . compelled in any criminal case to be a witness against himself."

Article II, Section 25, of the Montana Constitution provides that "[n]o person shall be compelled to testify against himself in a criminal proceeding."

The United States Supreme Court has noted that:

> It has long been held that this prohibition [the Fifth Amendment] not only permits a person to refuse to testify against himself at a criminal trial in which he is a defendant, but also "privileges him not to answer official questions put to

> him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings."

Minnesota v. Murphy (1984), 465 U.S. 420, 426 (quoting *Lefkowitz v. Turley* (1973), 414 U.S. 70, 77).

I would hold that Montana's constitutional right to avoid self-incrimination found at Article II, Section 25, is similarly applicable to formal or informal proceedings when a person's answers might incriminate him or her in future criminal proceedings.

The undisputed facts in this case clearly establish that Fuller was compelled to provide information about his own criminal conduct which then formed the basis for his prosecution for that conduct. The District Court's order dated January 27, 1994, which suspended Fuller's original sentence provided in part as follows:

> [S]aid prison sentence is suspended upon the following conditions . . . :
>
> . . . .
>
> 12. The defendant shall obtain and/or continue his enrollment and participation in the outpatient Sex Offender Treatment Program with a professional who is in compliance with the standards for treatment developed by the Montana Sex Offender Association. *The defendant shall follow all policies of that program* and shall not terminate from such treatment without prior approval of his Supervising Officer.
>
> . . . .
>
> IT IS FURTHER ORDERED, ADJUDGED AND DECREED that if the defendant fails to

> comply with any of the above-conditions, a bench warrant of arrest will be issued, the defendant apprehended, and the said defendant will be required to appear before this Court for further proceedings.

(Emphasis added.)

The stipulated facts subscribed to on behalf of the State of Montana by the Deputy Yellowstone County Attorney and filed with the District Court as the basis for its decision provide the following undisputed information about the requirements for Fuller's satisfactory completion of the sex offender program which was a condition to the suspension of his sentence:

> Patients are not admitted into the treatment program if they are in denial or do not honestly disclose their offending history. . . .
>
> Employees of South Central Treatment Associates are under a statutory duty to report any evidence they possess about past or present offenses committed by individuals in their treatment program. . . . *Offenders who enter in the treatment program are required to fully disclose their offense histories.* . . .
>
> . . . .
>
> . . . Exhibit E represents an offense history prepared by Fuller pursuant to treatment rules and presented in group on February 15, 1994, which reflect[s] the incidents which are the subject of this case.

(Emphasis added.)

No fair and objective review of the record before this Court can lead to any conclusion other than that Fuller

was compelled by order of court to participate in a program which required that he admit prior criminal offenses and that those admissions then formed the basis of the State's prosecution of Fuller in this case. These compelled admissions, therefore, violated the federal and state constitutional rights against self-incrimination.

The dissent takes the position that all of the above was perfectly okay because had Fuller chosen to test the District Court's authority to do what it threatened to do (put him in prison) he probably could have succeeded pursuant to our decision in *State v. Imlay* (1991), 249 Mont. 82, 813 P.2d 979. The dissent misses the point from any practical perspective.

The United States Supreme Court, in *Miranda v. Arizona* (1966), 384 U.S. 436, recognized that the right to remain silent in the face of custodial interrogation by law enforcement officials was meaningless to the average person unless that person was informed of his or her constitutional right. The U.S. Supreme Court therefore held that before persons suspected of committing a crime can be interrogated in a custodial situation, they must be advised of the right to remain silent and the consequences of failing to do so.

The dissenting opinion, however, proceeds from the assumption that while the average person cannot be expected to understand that he or she has a Fifth Amendment right, that same person should be fully aware of his or her rights pursuant to this Court's decision in *Imlay*, even though that person is specifically instructed to the contrary by agents for the State. The logic of that conclusion escapes me.

I, for one, as the author of *Imlay*, recall the outcry from the Attorney General's Office and prosecutors in this State about their surprise at that decision. Their complaint was that it was totally unforeseeable and unjustified by the prior decisions of this Court or the federal courts. While I strongly disagree, I am now at a loss to understand how the result could have been so unforeseeable to people with legal educations and years of experience in the area of criminal and constitutional law, and yet some totally uneducated and uninformed suspect is supposed to be aware of the case's implications.

I suppose there have been stranger arguments made before this Court. However, none come immediately to mind.

This is a classic penalty case. Fuller was told that he either report accurately and completely his prior history of sex offenses or he would not be allowed to remain in his treatment program and his suspended sentence would be revoked. Revocation of his suspended sentence meant imprisonment. He was never advised that he had a right pursuant to this Court's decision in *Imlay* to refuse to disclose his prior history of offenses and that he could not be sent to prison for doing so. There could not be a clearer threat of penalty for exercise of a person's right to remain silent.

The dissent's suggestion that we have no basis for concluding that Fuller admitted his prior offending history because it was a requirement of his treatment program is incorrect. The quoted portion of the District Court's order and the facts to which the State stipulated

make that fact absolutely clear. Furthermore, in case after case before this Court we have been told that admission of the offending history is a condition to participation in a sex offender treatment program. *See State v. Skroch* (1994), 267 Mont. 349, 357, 883 P.2d 1256, 1262; *State v. Cameron* (1992), 253 Mont. 95, 108, 830 P.2d 1284, 1292-93 (Trieweiler, J., dissenting); *Imlay*, 249 Mont. at 85-86, 813 P.2d at 982; *State v. Donnelly* (1990), 244 Mont. 371, 381, 798 P.2d 89, 95.

The dissent suggests that the U.S. Supreme Court's decision in *Murphy* clearly does not provide for immunity from prosecution based on the statements which are the subject of this appeal. If that conclusion is as obvious as the dissent suggests, I find it interesting that the State took just the opposite position before the United States Supreme Court when it argued *State v. Imlay* (1992), 506 U.S. 5. Although the writ of certiorari was dismissed in that case as improvidently granted, Justice White dissented. In his dissenting opinion, he noted that:

> At oral argument, however, two further questions were raised concerning whether any live controversy persists in this case. . . . Second, counsel for petitioner [the State of Montana] stated his belief that a probationer would enjoy immunity from prosecution for incriminating statements made during court-ordered therapy. This statement calls into doubt a critical assumption underpinning the Montana Supreme Court's judgment and might suggest that there really is no disagreement about the Fifth Amendment's application to this case.
>
> . . . This "concession" appeared to rest solely on the State's assumption that this

> Court's decision in Minnesota v. Murphy, 465 U.S. 420, 104 S.Ct. 1136, 79 L.Ed.2d 409 (1984), mandated such a result.

Imlay, 506 U.S. at 5, 7-8 (White, J., dissenting).

Apparently, even the Attorney General's Office did not agree with the dissent's interpretation of *Murphy* when the opposite interpretation was to its greater advantage.

Finally, I find it incredible that the dissent bemoans the fact that someone compelled to admit offenses should be given immunity from prosecution as a result of those disclosures. Immunity for compelled disclosures is nothing new. It is provided by statute. *See* § 46-15-331, MCA. The dissent does nothing less than suggest that the State's ability to enforce the law depends on its ability to compel citizens to disclose incriminating information about themselves. This suggestion would completely abrogate the plain language of the Fifth Amendment and Article II, Section 25, of the Montana Constitution. Law enforcement has successfully operated for over 200 years, in spite of the constraints imposed by the Fifth Amendment.

The nearly hysterical tone of the dissent's concerns is totally inconsistent with its initial legal conclusion. On the one hand, the dissent argues that Fuller should have known that pursuant to our decision in *Imlay* he had a right to refuse to disclose any prior offending history (in which event no one would have known about it; he could not have been prosecuted for it; and his victims could not have been treated). On the other hand, the dissent suggests that if he does disclose that prior history in an effort to be effectively treated and the State cannot prosecute

him on the basis of his compelled disclosures, the criminal justice system, as we now know it, will somehow crumble and the citizens of this state will be unsafe in their homes. How the two positions can possibly be reconciled is never explained.

I would suggest that the general public in Montana is much better off in the long term by effective treatment of sex offenders and their victims, which complete and open disclosure would further, than by the dissent's first suggestion which is that Fuller could have simply remained in the program and avoided revocation of his suspended sentence by invoking his right pursuant to *Imlay* to conceal his prior offending history.

I conclude that while the dissent may make sensational reading for nonlawyers, it makes little sense from a constitutional point of view, and if followed, it would impair the State's ability to effectively treat sex offenders and their victims.

/s/ Terry N. Trieweiler
Justice

Justice Karla M. Gray joins in the foregoing concurring opinion.

/s/ Karla M. Gray
Justice

Justice James C. Nelson dissenting.

I dissent from the Court's decision in this case. In summary, I would hold that under our interpretation of State v. Imlay (1991), 249 Mont. 82, 813 P.2d 979, cert. dismissed as improvidently granted, (1992), 113 S.Ct. 444, even if Fuller had been dismissed from or refused treatment under the sex offender treatment program because he invoked his Fifth Amendment right to not incriminate himself by disclosure of other uncharged sex offenses, his probation could not have been revoked. Accordingly, Fuller was under no explicit or implicit threat of sanction or penalty for exercising his Fifth Amendment right to remain silent. He did not, in fact, face a "classic penalty" situation or "Hobson's choice" that would have rendered his right against self-incrimination self-executing. Therefore, he was required to actually invoke that right, and in failing to do so, he waived his Fifth Amendment protection against self-incrimination and subjected himself to criminal prosecution for the other crimes which he voluntarily disclosed.

The Fifth Amendment's protection against compelled self-incrimination not only permits a person to refuse to testify against himself at a criminal trial in which he is a defendant, but also privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings. Minnesota v. Murphy (1984), 465 U.S. 420, 426, 104 S.Ct. 1136, 1141, 79 L.Ed.2d 409, 418 (quoting Lefkowitz v. Turley (1973), 414 U.S. 70, 77, 94 S.Ct. 316, 322, 38 L.Ed.2d 274, 281). See also Seizure of $23,691.00 in U.S. Currency

(Mont. 1995), 905 P.2d 148, 152, 52 St.Rep. 1063, 1065, where we cited with approval this same rule.

However, except in certain circumstances hereafter discussed, the privilege against self-incrimination is not "self-executing." Rather, it must be affirmatively claimed. In other words, a general obligation to appear and answer questions truthfully does not in itself convert a person's otherwise voluntary statements into compelled ones. A person's answers to questions put to him are not compelled within the meaning of the Fifth Amendment unless the witness is required to answer over his valid claim of privilege. *Murphy*, 465 U.S. at 427. If the person desires the protection of the privilege he must claim it or his answers will not be deemed compelled for Fifth Amendment purposes. *Murphy*, 465 U.S. at 427 (quoting United States v. Monia (1943), 317 U.S. 424, 427, 63 S.Ct. 409, 410, 87 L.Ed. 376, 380).

Moreover, "if a person under compulsion to testify makes disclosures instead of claiming the privilege, the government has not 'compelled' him to incriminate himself," *Murphy*, 465 U.S. at 427 (quoting Garner v. United States (1976), 424 U.S. 648, 654, 96 S.Ct. 1178, 1182, 47 L.Ed.2d 370, 377) and those disclosures are deemed voluntary and may be used against him in a subsequent criminal prosecution. *Murphy*, 465 U.S. at 440. This is true even where the government should reasonably expect the questions to elicit incriminating evidence (*Murphy*, 465 U.S. at 429), where the nature of the questions asked are incriminating (*Murphy*, 465 U.S. at 428 (quoting *Monia*, 317 U.S. at 433 and citing United States v. Mandujano (1976), 425 U.S. 564, 574-75, 96 S.Ct. 1768, 1775-76, 48

L.Ed.2d 212, 221)) or where the person alone is reasonably aware of the incriminating tendency of the questions (*Murphy*, 465 U.S. at 428 (Brennan, J., concurring) (quoting Roberts v. United States (1980), 445 U.S. 552, 562 n*, 100 S.Ct. 1358, 1365 n*, 63 L.Ed.2d 622, 632 n*)). If the person being questioned chooses to answer, his choice is considered to be voluntary because he was free to claim the privilege, because he was privileged to decline to answer and because he would suffer no penalty if he did so. *Murphy*, 465 U.S. at 429.

Here, as the majority recognizes, it is undisputed that Fuller failed to assert his Fifth Amendment privilege and decline to disclose evidence of his other uncharged sex crimes in response to questions posed by the therapist. Notwithstanding, Fuller claims that his case is within one of the exceptions to the above-stated rule that the Fifth Amendment's protection against self-incrimination is not self-executing, but, rather, must be affirmatively asserted. The Court in *Murphy* described this exception, known as the "classic-penalty" situation or "Hobson's choice," (*Murphy*, 465 U.S. at 443 (Marshall, J., dissenting)). The Court stated:

> The general rule . . . has also been deemed inapplicable in cases where the assertion of the privilege is penalized so as to "foreclos[e] a free choice to remain silent, and . . . compe[l] . . . incriminating testimony." *Garner* 424 U.S. at 661.
>
> * * *
>
> In each of the so-called "penalty" cases, the State not only compelled an individual to appear and testify, but also sought to induce

> him to forgo the Fifth Amendment privilege by threatening to impose economic or other sanctions "capable of forcing the self-incrimination which the Amendment forbids." Lefkowitz v. Cunningham (1977), 431 U.S. 801, 805, 97 S.Ct. 2132, 2135, 53 L.Ed.2d 1, 7.
>
> * * *
>
> These cases make clear that "a State my [sic] not impose substantial penalties because a witness elects to exercise his Fifth Amendment right not to give incriminating testimony against himself." *Lefkowitz*, 431 U.S. at 805.
>
> * * *
>
> [I]f the State, either expressly or by implication, asserts that invocation of the privilege would lead to revocation of probation, it would have created the classic penalty situation, the failure to assert the privilege would be excused, and the probationer's answers would be deemed compelled and inadmissible in a criminal prosecution.

Murphy, 465 U.S. at 434-35.

When faced with a classic penalty situation or Hobson's choice – i.e. being forced to choose between self-incrimination and suffering a sanction or penalty for choosing to remain silent – the Fifth Amendment privilege against self-incrimination is "self-executing." It does not have to be affirmatively asserted or claimed. *See, Cunningham*, 431 U.S. at 805; *Turley*, 414 U.S. at 79-84; Sanitation Men v. Sanitation Comm'r (1968), 392 U.S. 280, 283-84, 88 S.Ct. 1917, 1919, 20 L.Ed.2d 1089, 1092; Gardner v. Broderick (1968), 392 U.S. 273, 278-79, 88 S.Ct. 1913,

1916, 20 L.Ed.2d 1082, 1087; Garrity v. New Jersey (1967), 385 U.S. 493, 498-99, 87 S.Ct. 616, 619, 17 L.Ed.2d 562, 566.

Fuller claims, and the majority agrees, that he was faced with just such a classic penalty situation or Hobson's choice. He argues that he was required to honestly disclose his offending history in order to complete his sex offender program which was, in turn, a requirement of his probation. He contends that he was faced with the choice of truthfully disclosing his uncharged other sex crimes and facing criminal prosecution or not disclosing truthfully and being subject to termination from the sex offender program and revocation of probation.

Fuller's argument fails, however, because he and the majority ignore his third alternative. Fuller could have asserted his Fifth Amendment right to not incriminate himself. He could have simply refused to say anything about his uncharged sex offenses. This option was available to Fuller because under *Imlay*, had he chosen to remain silent, the State could not have imposed any sanction whatsoever against him for his assertion of his Fifth Amendment right. It could not have revoked his probation even if his participation in the sex offender program was terminated by reason of his refusal to disclose his uncharged sex offenses. *Imlay*, 813 P.2d at 985.

The majority ignores the fact that Fuller's position is premised in large part on his erroneous and unreasonable reading of our decision in *Imlay*. While in order to reach the result sought, the majority baldly declares that *Imlay* is beside the point and is irrelevant, it is precisely because of this Court's decision in *Imlay* that Fuller's right against self-incrimination was not self-executing for

Fifth Amendment purposes – there was absolutely no sanction which the State could impose on Fuller if he chose to exercise his right to remain silent. Moreover, Fuller did not consider *Imlay* beside the point or irrelevant. In fact, on brief and at oral argument, Fuller premised his position on his interpretation of our decision in that case, and he spent considerable effort arguing that *Imlay* did not prohibit the State from revoking his probation if he exercised his Fifth Amendment rights and refused to disclose his prior offending history. As Fuller stated on brief:

> Two central questions control the decision in this case. Will the court determine that *Minnesota v. Murphy* 104 S. Ct. 1136 (1984) controls? *Is this court willing to expand its holding in State v. Imlay 813 P.2d 979 (Mont., 1991)?* (Emphasis added).

However, while Fuller narrowly reads *Imlay* and argues that our holding in that case would not have precluded the trial court from revoking his probation because "all *Imlay* prohibits is revocation of a suspended sentence because of refusal to admit guilt to the charged crime," that clearly is not what our opinion stands for. We stated in *Imlay*:

> [B]y admitting guilt in this case, the defendant would have to abandon his right guaranteed by the Fifth Amendment, *not only as to the crime for which he has been convicted, but also to the crime of perjury* [since he had testified in is [sic] own defense at trial and denied committing the offense with which he was charged.]

Imlay, 813 P.2d at 985 (emphasis added). See also State v. Henrich (1994), 268 Mont. 258, 273, 886 P.2d 402, 411 (stating "*Imlay* prevents a sentencing court from incarcerating a defendant for refusing to confess to the crime in order to complete treatment that is a condition of a suspended sentence"). The State has correctly interpreted *Imlay* as precluding the revocation of probation because of the defendant's refusal to admit to not only the charged crime but to any other crime as well. The District Court correctly interpreted *Imlay* as mandating that result. We interpret *Imlay* in the same way.

Moreover, even the United States Supreme Court acknowledged that, clearly, the government cannot constitutionally carry out a threat to revoke probation for the legitimate exercise of the Fifth Amendment privilege. *Murphy*, 465 U.S. at 438. Fuller stands alone in his misreading of *Imlay*; his position is unreasonable and finds no support in either federal or state law. It is precisely because of our decision in *Imlay* that Fuller's Fifth Amendment right against self-incrimination was not self-executing, and it is because of *Imlay* that the majority decision, here, is wrong. That the majority chooses to disregard *Imlay* is, accordingly, understandable. Its choice to simply ignore the law does not, however, render its legal analysis correct.

In short, there was nothing that would have prevented Fuller from exercising his Fifth Amendment right and refusing to disclose his offending history. Even if he was terminated from the sex offender program, his probation could not, as matter of state and federal law, have been revoked. While Fuller was, without doubt, faced with a difficult, technical choice as to whether to disclose

his sex offending history or to stand on his right to remain silent, he was not, in fact or in law, faced with a classic penalty situation nor with a Hobson's choice as the majority has erroneously concluded.

In truth, Fuller, who was not sworn, who was not in a custodial interrogation and who was not under a subpoena when he made his disclosures, was faced with even less intimidating pressure than is a person who is compelled to tell the truth upon being required to testify in court, before a grand jury or in some other proceeding where he is under subpoena, is sworn and is under pain of contempt. Even in those circumstances the law is clear that the witness must affirmatively assert his Fifth Amendment privilege, and, in the usual case, must do so on the basis of his own knowledge of his rights, without the benefit of any prior *Miranda* warning (which is not required, in any event, since there is no custodial interrogation) and without the benefit of counsel. If the witness fails to claim his Fifth Amendment right to remain silent, his statements can be used against him in a subsequent criminal prosecution. See *Murphy*, 465 U.S. at 427, 430-31.

Here, Fuller was at all times represented by counsel from whom he could have sought advice as to the exercise of his Fifth Amendment rights and as to the consequences of his doing so. Knowing that he would have to disclose his sex offending history as part of his sex offender treatment, he could have sought immunity from prosecution during plea negotiations. He availed himself of neither option.

Moreover, the actual record in this case does not support Fuller's position. Neither the portion of the stipulated facts relied upon by the majority nor any other part thereof state or imply, much less concede, that Fuller was ever told, threatened or led to believe that the exercise of his Fifth Amendment right would result in his being sanctioned.

Rather, as the District Court found, and as Fuller concedes, he was never told or led to believe that the exercise of his Fifth Amendment privilege would result in revocation of his probation, and there is no evidence in the record that Fuller admitted to his prior crimes because he feared revocation if he chose to remain silent. There is no evidence that Fuller was deterred from claiming his Fifth Amendment privilege by the threat of revocation. There is nothing in the stipulated facts which describes any subjective belief on Fuller's part that he would be sanctioned for exercising his Fifth Amendment right to remain silent or that he was under any real threat, explicit or implicit, that his probation would be revoked.

To the contrary, we are left only with Fuller's self-serving, after-the-fact justifications for his failure to assert his privilege against self-incrimination and his unreasonable interpretation of *Imlay* – an interpretation which flies not only in the face of the clear language of that opinion but in the face of *Murphy* which he and the majority, cite as authority for their position. In this regard, the only reason Fuller relies upon and argues *Murphy*, is that he misreads *Imlay*, erroneously maintaining that our decision in that case would permit the revocation of his probation if he had exercised his Fifth

Amendment privilege to remain silent. No one agrees with that contention.

While the majority cites *Murphy*, it does so on the proposition that Fuller's case and *Murphy* are factually "far different." Nothing could be further from the truth. The facts are almost identical. Murphy's incriminating statements, like Fuller's, were first made to his sex offender treatment program counselor, and, as here, it was the counselor who reported the previously unknown crimes to the probation officer, who in turn reported to the police. *Murphy*, 465 U.S. at 423.

While the majority states that Murphy's obligation to tell the truth was only a general obligation, and Fuller's was "clearly and precisely set out," this is truly a distinction without a difference. As the *Murphy* opinion states:

> [t]he terms of Murphy's probation required, among other things, that he participate in a treatment program for sexual offenders at Alpha House, report to his probation officer as directed, an [sic] be truthful with the probation officer "in all matters." Failure to comply with these conditions, Murphy was informed, could result in his return to the sentencing court for a probation revocation hearing.

Murphy, 465 U.S. at 422. Accordingly, whether the obligation to be truthful was general or specific, it is clear that Murphy was faced with precisely the same sort of pressure of potential sanction for lying (revocation of probation and imprisonment) as was Fuller. Of more importance is the fact that in neither *Murphy* nor in the instant case was there any proscription of the defendant's freedom to decline to answer particular questions and no

suggestion that either's probation was conditional on his waiving his Fifth Amendment privilege with respect to further criminal prosecution. *See, Murphy,* 465 U.S. at 437.

Moreover, any implication that Fuller – a person who was already well acquainted with the criminal justice system – did not appreciate or understand his right to remain silent is ludicrous. As the Supreme Court noted:

> [a]t this point in our history virtually every schoolboy is familiar with the concept, if not the language, of the [Fifth Amendment].

Murphy, 465 U.S. at 437 (citing Michigan v. Tucker (1974), 417 U.S. 433, 439, 94 S.Ct. 2357, 2361, 41 L.Ed.2d 182, 190).

Contrary to the majority's opinion, *Murphy* and the instant case are on all fours, and the same result should, accordingly, obtain. Yet, incredibly, this Court relies on *Murphy* to come to precisely the opposite result on the same essential facts.

As in *Murphy,* Fuller was not faced with a classic penalty situation or a Hobson's choice. His right to be free from self-incrimination was not self-executing, and his incriminating disclosures of his prior uncharged sex crimes were not compelled within the meaning of the Fifth Amendment. As a result, he could not prevent his volunteered disclosures from being used against him in the subsequent criminal prosecutions at issue here. See *Murphy,* 465 U.S. at 437-40. The majority's conclusion to the contrary is wrong.

The foregoing aside, it also deserves mention that the ramifications of today's opinion go beyond the mere reversal of Fuller's conviction and his premature release

from a much-deserved, lengthy term of imprisonment. Rather, the greater mischief in the majority's decision is that in failing to apply to this case the well-established rules and principles that a correct Fifth Amendment analysis requires, we have now effectively established a rule of absolute immunity from prosecution for criminal defendants who confess (and who now, according to our opinion, *must* confess) to otherwise unknown crimes during sex offender treatment. Now, when the defendant tells all his past crimes to the therapist, he obtains complete absolution and a plenary indulgence; he's home free. There will henceforth likely be more sins forgiven in sex offender treatment than in the confessional.

In *Murphy*, the defendant, as part of sex offender treatment, disclosed a previously unknown homicide perpetrated as part of a previously unknown rape. Just like Fuller, he sought to suppress his statements in connection with his subsequent prosecution for the undisclosed crimes on the basis that his confession was obtained in violation of his Fifth Amendment right against self-incrimination. *Murphy*, 465 U.S. at 422-25. By applying a proper Fifth Amendment analysis, as discussed above, the Court concluded that Murphy's statements were voluntary, were not compelled and that he could be prosecuted. *Murphy*, 465 U.S. at 440. That will, henceforth, not be the result in Montana under our decision here. Fuller and similarly situated defendants, unlike Murphy, will never be brought to justice for their crimes. As a result of this decision, it will be interesting indeed, to watch the legal cartwheels when some defendant first confesses to a previously unknown homicide during sex offender therapy.

Furthermore, as pointed out above, it is well-established that a witness who is sworn and compelled to testify truthfully in court, in some other legal proceeding or before a grand jury on the pain of contempt does not need to be given a *Miranda* warning, but, rather, must affirmatively assert his Fifth Amendment privilege in order to avoid incriminating himself. See *Murphy*, 465 U.S. at 431. That long-standing legal principle is now very much in question as a result of our decision here. Any witness who incriminates himself can now make the same argument as Fuller. "Nobody told me I had to assert my Fifth Amendment right, or that I even could. Since I was subpoenaed to testify and sworn to tell the truth, I figured I didn't have any other choice and that I'd be thrown in jail for contempt if I didn't testify." Presumably, such a witness will be able to cite our decision in this case for the rule that, under such circumstances, his incriminating statements cannot be used against him in a subsequent criminal prosecution.

How the various participants in the criminal justice system in Montana will now deal with the rule we have established remains to be seen. We have, in my view however, ignored well-established principles of Montana and federal law to reach a result that is grounded in nothing more than the illogical proposition that even where the record and the law do not support the conclusion that Fuller was required to incriminate himself, he was "compelled" nonetheless. In doing so, we have misapplied a U.S. Supreme Court decision factually and legally on point and we have unnecessarily undone a whole body of Fifth Amendment law. Worse, in the process we have created much greater and more serious

problems that will have ramifications far beyond the fact situation presented here.

I would affirm the decision of the District Court, and I dissent from our failure to do so.

/s/ James C. Nelson
Justice

Chief Justice J.A. Turnage and Justice Charles E. Erdmann concur in the foregoing dissent.

/s/ J.A. Turnage
Chief Justice

/s/ Charles E. Erdmann
Justice

APPENDIX B

MONTANA THIRTEENTH JUDICIAL DISTRICT COURT, YELLOWSTONE COUNTY

STATE OF MONTANA,	)	Cause No. DC 94-434
Plaintiff,	)	
	)	Judge Robert W. Holmstrom
vs.	)	
MATTHEW FULLER,	)	**STIPULATION OF FACTS**
	)	
Defendant.	)	(Filed Dec. 8, 1994)

COME NOW the parties, hereto, through counsel, and Stipulate to the following facts:

On December 9, 1992, Fuller was charged in Cause No. DC 92-558 with three (3) counts of Attempted Sexual Assault. (Exhibit A).

On October 19, 1993, the Supreme Court, pursuant to a Petition for a Writ of Supervisory Control, ordered that the District Court set the case for a non-jury trial and, after a one (1) day trial, Fuller was found guilty on all three (3) counts.

On January 26, 1994, Judge G. Todd Baugh signed a Judgment and Commitment Order sentencing Fuller to ten (10) years on each count to run concurrently. (Exhibit B) The execution of the sentence was suspended upon the performance by Fuller of certain conditions. Two of those conditions were the following:

> 6. The defendant is hereby required to submit to reasonable searches of his person, vehicle, or premises whenever requested to do so by his

probation officer or by a Law Enforcement Officer at the direction of his Probation Officer. The purpose of these searches is to help the defendant in his rehabilitation.

12. The defendant shall obtain and/or continue his enrollment and participation in the outpatient Sex Offender Treatment Program with a professional who is in compliance with the standards for treatment developed by the Montana Sex Offender Association. The defendant shall follow all policies of that program and shall not terminate from such treatment without prior approval from his Supervising Officer. (Exhibit B).

On January 11, 1994, Fuller appealed his conviction to the Montana Supreme Court and, on September 15, 1994, his conviction was reversed by the Montana Supreme Court (No. 94-113) with remand instructions to the District Court to enter a judgment of acquittal. A Petition for a rehearing was filed on September 23, 1994, and denied by the Supreme Court. A remittitur was issued by the Montana Supreme Court and an Order entering a Judgment of acquittal was signed by Judge Baugh on November 18, 1994.

On April 14, 1994 the State petitioned the Court to revoke Fuller's suspended sentence. The grounds for the revocation do not include the charges presently before this Court. Fuller admitted the allegations on June 22, 1994 and the Court, on the same day, revoked Fuller's sentence and sentenced him to ten (10) years in prison.

After Fuller was first sentenced in January, 1994 he entered sexual offender treatment with Mike Sullivan and Paul Horton of South Central Treatment Associates. Prior

to sentencing, a sexual offender evaluation was ordered by the District Court. Fuller was accepted into treatment prior to imposition of sentence.

Patients are not admitted into the treatment program if they are in denial or do not honestly disclose their offending history. Further, patients will be terminated from the program if the same occurs during their treatment, they re-offend during treatment, or otherwise break the rules of the treatment program.

Employees of South Central Treatment Associates are under a statutory duty to report any evidence they possess about past or present offenses committed by individuals in their treatment program. In his six and one-half (6½) years in Billings, Mike Sullivan is not aware of any cases which have been prosecuted as a result of disclosure made during treatment. Offenders who enter in the treatment program are required to fully disclose their offense histories. The County Attorney submits that in previous cases involving defendants charged with sex offenses, where a defendant has, during plea negotiations with respect to the charged defense, disclosed other non-violent sex offenses, and the defendants have not been prosecuted when he has again disclosed those other offenses in the course of offender counseling.

Although the defendant made a plea offer to the County Attorney prior to trial, he did not disclose the offense, now before the Court, prior to his disclosures to South Central Treatment associates.

Exhibits C, D and E are copies of disclosures prepared by Fuller as a requirement of the treatment program. On February 8, 1994, Fuller disclosed acts he

performed on three (3) girls in October, 1992. (Exhibit D). Exhibit E represents an offense history prepared by Fuller pursuant to treatment rules and presented in group on February 15, 1994, which reflect the incidents which are the subject of this case. Exhibit E sets forth the names, ages and addresses of the alleged victims.

On March 30, 1994, Sullivan and Horton wrote a letter to Phil Sanderson of Adult Probation and Parole indicating that Fuller "abrogated" the treatment policies and then enumerated incidents in the letter which would "contraindicate Matthew's appropriateness" for their program. (Exhibit F).

On March 30, 1994, Fuller was arrested by Probation Officer Steve Hurd, searched and placed in the Yellowstone County Detention Facility. The reason for the search was that Hurd had received a call from South Central Treatment Associates telling him basically what was in the March 30th letter. During the course of the search, a small amount of marijuana was found. Also, on March 30, 1994, Officer Hurd called the Mussellshell Count [sic] Sheriff's Department and eventually talked with Deputy Fisher. Hurd requested that Fisher conduct a search of Fuller's room at his (Fuller's) mother's residence, which Fisher did. Fisher was asked to search for pornographic materials, videos, written materials and drugs. Taken during the search of the residence were books, video tapes and "hand-written items", all of which were placed into evidence. The "hand-written items" including exhibits C, D, and E. The items seized were sent to Probation Officer Jim Corcoran.

On April 11, 1994, Horton and Sullivan wrote a two and a half (2½) page letter to Jim Corcoran at Probation and Parole. (Exhibit G). This letter set forth how the decision to terminate Fuller from the program was reached and the reasons for that decision. The letter sets forth the following:

1) Fuller fondled a disabled girl prior to his conviction;

2) He fondled three (3) young girls in Billings. These are the same girls that are the alleged victims in this case; (Exhibit E).

3) Matt fondled a minor girl in 1987; (Exhibit E).

4) The reasons later set forth in the petition to revoke that was filed on April 18, 1994.

On April 14, 1994, Probation Officer Corcoran contacted the Billings Police Department and informed them that Fuller had assaulted five (5) young girls, aged six (6) to eleven (11), from 1987 to 1992, including the three (3) that are the "victims" in this case. (Exhibit H). Corcoran also provided the police with the treatment notes seized during the search (Exhibits C, D, and E) which revealed all these incidents which also are the incidents referred to in the April 11th letter above. (Exhibit I).

Prior to his call to the police, Probation Officer Corcoran contacted the County Attorney's office and asked what he should do with information he had regarding prior offenses. He was told to call the police department.

Between April 14, 1994, and May 5, 1994, the police department investigated these incidents and took statements. No investigation had occurred prior to the police

department receiving the information that had been received for the Probation Department.

In the fall of 1992, the children who are the alleged victims of these offenses had advised their parents that they had been assaulted by a person known to them as Matt. At that time, the parents knew the defendant as Matt, but did not know his complete identity. The offenses were not reported to any law enforcement at this time. When the defendant was arrested with respected [sic] to the Attempt charges in December of 1992, the parents became aware of the defendant's full identity due to media coverage of that case. Shortly after the defendant's arrest for the attempt charges, the children's father called the Yellowstone County Sheriff's Department. He told the Sheriff's Department that he had a report to make about an offense committed by Mr. Fuller. He was transferred to the Detective Division. The detective in turn transferred the father to the Department of Family Services. The father, feeling that he was getting the run around did not talk to the Department of Family Services. None of the conversations with the Sheriff's Department got to the point where the father identified himself or his children, by name, address, or phone number, or where any details of the nature of the complaint were discussed. Subsequently, the parents of the children did not disclose this offense to law enforcement until contacted by the Billings Police Department in April, 1994. The police department contacted the family as a result of information provided them by people who were contacted at that address and supplied in Exhibits D, E, and F. When the mother of the children was contacted by the Billings

Police Department she was told that the police department wished to speak with her children about Matthew Fuller concerning allegations of sexual assault in regard to her children. The mother of the children told her daughters that the police department wished to speak with them about Matt Fuller. The children agreed with their mother that they would talk to the police officers and give statements concerning what Matt Fuller had done to them.

Detective Frank Brun of the Billings Police Department investigated the case between April 14, 1994 and May, 5, 1994. He read the documents given him by Corcoran. Prior to that date he knew nothing about the incidents. Initially, he went to the address listed on the sheet of paper given him but determined the family no longer lived in the trailer. From neighbors he was able to get ahold of Kathy Rehard, at whose house the incidents in question allegedly happened, and she told the detective the family lived at the Overpass Motel. Detective Brun contacted the family and they came to the police department to give statements. When the statements were given by the children the written notes of the defendant were not referred to, or shown to, the children.

The case was referred to the County Attorney's Office by the police department on May 5, 1994 by Officer Barone.

DATED this 8th day of December, 1994.

/s/ John Kennedy	/s/ Gary E. Wilcox
Deputy Yellowstone	Gary E. Wilcox
County Attorney	Deputy Public Defender

APPENDIX C

MONTANA THIRTEENTH JUDICIAL DISTRICT COURT,
YELLOWSTONE COUNTY

STATE OF MONTANA, Plaintiff, vs. MATTHEW FULLER, Defendant.	)	No. DC 94-434 Judge Robert W. Holmstrom ORDER (Filed R.K. Ness)

The Defendant's Motion to Dismiss dated September 29, 1994, the Defendant's Motion, dated September 29, 1994, to Suppress introduction of statements of the Defendant dated and the Defendant's Motion, dated September 24, 1994, to Suppress testimony of alleged victims came on for hearing before the Court on Friday, December 30, 1994; Gary E. Wilcox appeared on behalf of the Defendant and John Kennedy appeared on behalf of the State of Montana; the parties submitted to the Court a stipulation of facts and during the hearing the Defendant withdrew his motion to suppress introduction of his statements based upon an illegal search; the Court having considered the stipulation of facts, the motions, the briefs and arguments of counsel and, for good cause appearing.

IT IS HEREBY ORDERED AS FOLLOWS:

1. That the Defendant's Motions be, and they are hereby DENIED.

DATED THIS 24th day of January, 1995.

/s/ Robert W. Holmstrom
DISTRICT JUDGE

MEMORANDUM

FACTUAL AND PROCEDURAL HISTORY

On December 9, 1992, Matthew Fuller was charged with three counts of Attempted Sexual Assault. On October 9, 1993, the Montana Supreme Court, pursuant to a Petition for a Writ of Supervisory Control, ordered the District Court to set the case for a trial, after which Fuller was found guilty on all three counts.

On January 26, 1994, Judge Baugh sentenced Fuller to ten years on each count to run concurrently. The prison sentence was suspended and Fuller was placed on probation upon the performance of certain conditions, including the following:

> 6. The defendant is hereby required to submit to reasonable searches of his person, vehicle or premises whenever requested to do so by his Probation Officer or by a Law Enforcement Officer at the direction of his Probation Officer. The purpose of these searches is to help the defendant in his rehabilitation.
>
> 12. The defendant shall obtain and/or continue his enrollment and participation in the outpatient Sex Offender Treatment Program with a professional who is in compliance with the standards for treatment developed by the Montana Sex Offender Association. The defendant shall follow all policies of that program and shall not terminate from such treatment without prior approval from his Supervising Officer.
>
> 14. The defendant should be administered regular polygraph examinations to assess his honesty and behavior in the community and said

polygraph may be used for treatment but not for termination from the Sex Offender Treatment Program.

Prior to sentencing, the District Court ordered a sexual offender evaluation pursuant to § 46-18-111, MCA, and Fuller was accepted into the treatment program. Fuller appealed his conviction to the Montana Supreme Court, and while his appeal was pending, he entered sex offender treatment with Mike Sullivan and Paul Horton of South Central Treatment Associates.

The parties have stipulated to the fact that patients are not admitted into the sex offender treatment program, or will be terminated from the program, if they are in denial or do not honestly disclose their offending history. Likewise, patients will be terminated from the program if they re-offend during treatment or break other rules of the program.

In a treatment session on February 8, 1994, Fuller admitted to sexual acts he performed on three minor girls in October 1992, which are the subject of the instant prosecution. Pursuant to treatment rules, Fuller prepared an offense history which reflects these admissions. He presented this history in a treatment group on February 15, 1994.

On March 30, 1994, therapists Sullivan and Horton wrote a letter to Phil Sanderson of Adult Probation and Parole indicating that Fuller had disclosed during therapy various events in which he had "abrogated" their treatment policies. Specifically, Fuller was actively "stalking" a minor female and had recently purchased and utilized pornographic materials, both acts in violation of

conditions of probation. The therapists stated their belief that these instances "contraindicate Matthew's appropriateness for outpatient sex offender treatment."

On March 30, 1994, Probation Officer Steve Hurd arrested Fuller and a small amount of marijuana was found in his possession during a search. Also on March 30, Officer Hurd contacted the Mussellshell County Sheriff's Department and requested a Deputy Fisher to conduct a search of Fuller's room at his mother's residence. Books, video takes and "hand-written items" were taken during the search and placed into evidence.

The seized items were sent to Probation Officer Jim Corcoran. On April 11, 1994, therapists Horton and Sullivan wrote a letter to Officer Corcoran reiterating their reasons for terminating Fuller from treatment. The letter set forth the current probation violations which were utilized in the Petition to Revoke Fuller's probation filed on April 18. The letter also reported offenses against several minor females committed prior to conviction, including the three that are the alleged victims in the instant case.

On April 14, 1994, Officer Corcoran contacted the Billings Police Department and informed them of Fuller's prior offenses and provided them with the treatment notes seized during the search. The Police Department investigated these incidents and obtained statements from the alleged victims. On May 5, 1994, the case was referred to the County Attorney's Office.

On April 18, 1994, the State petitioned the Court to revoke Fuller's suspended sentence because of his violation of certain court-ordered conditions. This Court takes

judicial notice of the "Report of Violation" filed by the Montana Department of Institutions, Corrections Division, on April 15, 1994. The report sets forth the following: (1) Fuller violated Court Condition #1 by being in possession of a small packet of marijuana at the time he was searched upon his arrest on March 30 and testing positive for marijuana on the same date; (2) Fuller violated Court Condition #12 by disclosing in treatment that he had been actively "stalking" and that he had recently purchased and utilized pornographic materials; (3) Fuller violated Court Condition #13 by reason that the search of his residence produced video tapes which depict scenes of nude female children and books describing sexual acts; and (4) Fuller violated Court Condition #15 by being observed watching children in a vehicle parked across from the Roundup Central School on certain dates in March. None of the alleged violations include the offenses for which Fuller is being currently prosecuted.

On June 22, 1994, Fuller admitted to the above allegations of violations and the Court revoked his sentence and sentenced him to ten years in prison. On September 2, 1994, this Court granted leave to file an Information, charging Fuller with one count of Sexual Intercourse Without Consent and two counts of Sexual Assault, all three counts based on Fuller's admissions of prior offenses made during sex offender treatment concerning the three minor females. On September 12, 1994, Fuller pleaded not guilty to all counts.

On September 15, 1994, the Montana Supreme Court, pursuant to Fuller's appeal, reversed his original conviction with remand instructions to the District Court to enter a judgment of acquittal. On September 23, 1994, the

State filed a Petition for a Rehearing, which was denied. Judge Baugh signed a Judgment of Acquittal on November 18, 1994.

On September 29, 1994, Fuller filed a Motion to Dismiss the Information charging him with sexual offenses filed on September 2, 1994, upon the following grounds: (1) that the criminal charges were filed against Fuller as a direct result of his disclosures made during court-ordered sexual offender counseling, contrary to the rule of *State v. Thiel*, 236 Mont. 63, 768 P.2d 343 (1989); (2) that the statements made to his therapist were not voluntarily given and should be suppressed; and (3) that the treatment program mandated by statute violated Fuller's right against self-incrimination under the United States and Montana Constitutions.

On the same date, Fuller filed a Motion to Suppress Introduction of his written Statements upon the grounds that the search of his residence violated his constitutional right to be free of unreasonable searches and seizures and a Motion to Suppress Testimony of Alleged Victims upon the grounds that the introduction of this testimony would violate the "fruits of the poisonous tree" doctrine of *Wong Sun v. United States*.

On December 30, 1994, the motions came on for hearing, during which Fuller withdrew the Motion to Suppress the introduction of his own statements based upon the alleged illegal search.

ISSUE

Should the Information charging Fuller with sexual offenses committed prior to his original conviction and disclosed by Fuller during the course of court-ordered sex offender treatment be dismissed because of the following: (1) the State's use of such disclosures is contrary to the "fundamental fairness" doctrine set forth in *State v. Thiel;* or (2) the State's use of such disclosures violates Fuller's right against self-incrimination under the Fifth Amendment of the U.S. Constitution and Art. 2, § 25 of the Montana Constitution?

DISCUSSION

I. MOTION TO DISMISS BASED ON *STATE v. THIEL*

Fuller moved this Court to dismiss the Information filed against him based on *State v. Thiel,* 236 Mont. 63, 768 P.2d 343 (1989). In *Thiel,* the Montana Supreme Court held that fundamental fairness prohibited the prosecution of a defendant for offenses that were revealed and already considered during plea negotiations and sentencing. Defendant (Thiel) had been charged with two counts of sexual intercourse without consent against his step-daughter. During the course of plea negotiations with the count [sic] attorney, the parties agreed that a condition of the agreement would be that Thiel participate in a sexual offender's treatment program. *Id.* at 64. In addition, the parties discussed a two or three year deferred sentence. *Id.*

Before Thiel entered his plea, he underwent a psychological evaluation to determine whether he was

amenable to treatment. During the evaluation, Thiel admitted to additional episodes involving sexual misconduct, including abuse of his stepdaughter's sibling. During plea negotiations, these disclosures were conveyed to the county attorney and defense counsel and a seven year suspended sentence was agreed upon. *Id.* The Court found that the record indicated that the increase in the sentence recommendation directly resulted from Thiel's disclosures during the evaluation. *Id.* Thiel pleaded guilty to two counts of sexual assault, pursuant to the plea agreement, and received a seven year suspended sentence. *Id.*

Several months later, Thiel re-offended against both the children and, at that time, they reported the latest assaults as well as the numerous prior offenses, which he had admitted during his psychological evaluation. Thiel was then charged with twenty-six counts of sexual intercourse without consent, twenty-four counts based upon the prior assaults and two counts based on the recent assaults. *Id.*

Thiel moved to dismiss the first twenty-four counts on the grounds that they had been the subject of the earlier plea bargain agreement. The court denied the motion and Thiel was convicted and sentenced on all counts. On appeal, Thiel contended that it was "fundamentally unfair to prosecute him for offenses that were revealed and considered during plea negotiations and sentencing for the previous charges." *Id.* at 65.

The Montana Supreme Court found the record indicated that a prerequisite to Thiel's plea bargain with the

State was his admission to a treatment program. Acceptance into a program was conditioned upon his amenability to treatment, determined through an evaluation. His willingness during the evaluation to admit to past misconduct was an indicator of his amenability. *Id.* at 65. If the evaluator rejected him, the plea negotiations would cease, likely resulting in a prison sentence. Thus, Thiel underwent an evaluation in order to ensure continued negotiations, during which he revealed the sex offenses he was currently being prosecuted for. As a result of this information reaching the county attorney and defense counsel, the parties agreed upon a greater sentence than originally discussed. *Id.*

The Montana Supreme Court agreed with Thiel by holding that "fundamental fairness forbids the State from now prosecuting him for offenses for which he has essentially already been punished." *Id.* The Court reversed the judgment on the first twenty-four counts.

In the instant case, Fuller, similar to Thiel, was charged with sex offenses and underwent an evaluation to determine his amenability to a sex offender treatment program. In both cases, the offender's amenability to treatment was, in part, determined by a willingness to admit prior offenses. The admission of prior sexual misconduct which ultimately led to charges filed against Fuller were made during the course of treatment. Thiel's disclosures were made during the initial evaluation.

However, factual differences arise at this point which distinguish the instant case from *Thiel*. The prior offenses disclosed by Fuller were not used by the State to revoke his suspended sentence. Instead, revocation was the

result of conduct Fuller engaged in which directly violated the conditions of his suspended sentence. Thus, while the Montana Supreme Court found that Thiel was being prosecuted for offenses that had already been considered in sentencing, Fuller is not currently being prosecuted for any offenses for which he has already been "punished." The Montana Supreme Court decided that it was "fundamentally unfair" to punish Thiel twice for the same acts. But the Court did not hold that it was fundamentally unfair to prosecute a defendant on the basis of any admissions made during evaluation of treatment. Therefore, the "fundamental fairness" doctrine of *State v. Thiel* does not support his motion to dismiss.

II. MOTION TO DISMISS BASED ON RIGHT AGAINST SELF-INCRIMINATION

Fuller has, likewise, moved this Court to dismiss the Information filed against him because the court-ordered sex offender treatment program violated his right against compulsory self-incrimination under the Fifth Amendment of the U.S. Constitution and Art. 2, § 25 of the Montana Constitution. Counsel have only briefed cases regarding this motion in which either the Montana Supreme Court or courts from other jurisdictions have addressed the Fifth Amendment. Because Art. 2, § 25 of the Montana Constitution is not specifically addressed, this Court presumes the parties have concluded that no differences exist between the federal and the State of Montana's right against self-incrimination.

The relevant part of the Fifth Amendment provides that no person "shall be compelled in any criminal case to

be a witness against himself." The general rule is that a witness must assert the privilege:

> The [Fifth] Amendment speaks of compulsion. It does not preclude a witness from testifying voluntarily in matters which may incriminate him. If, therefore, he desires the protection of the privilege, he must claim it or he will not be considered to have been "compelled" within the meaning of the Amendment."

United States v. Monia, 317 U.S. 424, 427 (1943). If the witness invokes the privilege and a rational threat of self-incrimination exists, the witness is not required to answer unless the State provides assurances that the statement may not be used against that person. *Murphy v. Minnesota*, 465 U.S. 420, 426-427, 104 S. Ct. 1136, 1142-3 (1984). However, if a witness who is under a general obligation to appear and answer questions truthfully makes disclosures rather than claiming the privilege, "the government has not 'compelled' him to incriminate himself." *Murphy*, 465 U.S. at 427, 104 S.Ct. at 1142.

Application of this general rule is subject to certain well-defined exceptions. One exception relevant to the instant issue has been referred to as the "classic penalty situation," where by asserting the privilege, the witness is penalized so as to foreclose the free choice to remain silent. *Murphy*, 465 U.S. at 435, 104 S. Ct. at 1146. In these "penalty" cases, in addition to compelling the individual to appear and testify, the State has also attempted to convince the individual to relinquish his Fifth Amendment privilege by threatening to impose sanctions. *Id.* Such circumstances give rise to a "self-executing privilege." *Id.*

The majority of courts addressing the "penalty" exception under circumstances similar to the instant case hold that a State may not impose substantial penalties because a witness elects to exercise his Fifth Amendment privilege. *See State v. Imlay,* 294 Mont. 82, 813 P.2d 979 (1991); *Mace v. Amestoy,* 765 F. Supp. 847 (D.Vt. 1991). In *Imlay,* the defendant was convicted of sexual assault and received a suspended sentence and probation under certain conditions, one being that he enroll in and complete a sexual therapy program. However, the defendant was not allowed to complete the program because he refused to admit to the crime for which he was convicted. As a result, his suspended sentence was revoked. *Id.* at 87.

On appeal, the Montana Supreme Court held that a criminal defendant cannot be compelled, as a condition of a suspended sentence, to admit that he is guilty of a crime for which he has been convicted. The Court asserted that the defendant still had the right to challenge his conviction which would be rendered meaningless if compelled to admit guilt as a condition of probation. *Id.* at 91. Moreover, the Court found that by admitting guilt, the defendant would be relinquishing his right against self-incrimination to both the crime for which he was convicted as well as the crime of perjury, since during trial he had denied the crime he was charged with. *Id.*

Similarly, in *Mace v. Amestoy, supra,* the defendant (Mace) was charged with sexual assault of his stepdaughter. Pursuant to a plea agreement, he entered a guilty plea to the charge of "lewd and lascivious" and received a suspended sentence and probation with the condition that he shall participate in sexual therapy. *Mace,* 765 F. Supp. at 848. However, because he continued to deny the

act of sexual intercourse, his probation was violated and he was sentenced to 60 days. On appeal, Mace argued that forcing him to incriminate himself violated his Fifth Amendment right. *Id.* at 849. The Vermont Supreme Court disagreed and affirmed the revocation, noting that if a defendant is convicted of a lessor offense pursuant to a plea agreement, he cannot later be prosecuted on the originally charged offense and, thus, no privilege existed regarding the action surrounding the lesser charge. *Id. See State v. Mace*, 578 A.2d 104 (Ver. 1990).

Mace then petitioned the federal district court with a writ of habeas corpus. *Mace v. Amestoy*, 765 F. Supp. at 849. The federal court granted the writ, finding that forcing Mace to admit to sexual intercourse as a requirement for completion for a sexual offender treatment program, which was a condition of his probation, violated the Fifth Amendment. *Id.* The court found that the Vermont Supreme Court was incorrect in chiefly considering the likelihood of prosecution, and instead the proper consideration should be the nature of the coerced disclosure. *Id.* at 851. The court acknowledged that the State may insist on answers but its burden is then to eliminate the threat of incrimination. *Id.* at 852. The court vacated the revocation of Mace's probation.

Fuller's case is the reverse of the situation in *Imlay* and *Mace*. Whereas both Imlay and Mace elected to exercise their Fifth Amendment right against self-incrimination and the State then attempted to penalize them for doing so, the record in Fuller's case makes no indication that he ever attempted to invoke his right before making admissions during the course of treatment. The question in Fuller's case is whether he voluntarily admitted to the

prior offenses and thereby relinquished his Fifth Amendment privilege or whether he was compelled to make the admissions, causing him to fall within an exception to the general rule, where the privilege to became self-executing.

In *Minnesota v. Murphy*, the United States Supreme Court addressed a factual situation more analogous to the facts in Fuller's case. In *Murphy*, the defendant (Murphy) entered a plea of guilty to a false imprisonment charge in a prosecution for criminal sexual conduct and received a suspended sentence and probation. His terms of probation included the requirement to participate in a treatment program and to report to his probation officer and be truthful "in all matters." 465 U.S. at 422, 104 S. Ct. at 1139. During the term of his probation, the probation officer received information from his treatment counselor that he had admitted to a pre-conviction rape and murder. Upon being questioned by his probation officer, Murphy admitted the crimes. After being indicted, he sought to suppress his confession on Fifth Amendment grounds. 465 U.S. at 423-425, 104 S. Ct. at 1140-1141. The Minnesota trial court found his confession was not compelled or involuntary and the Minnesota Supreme Court reversed, holding that the failure to assert his privilege was not fatal to his claim. *Id.*

The State appealed and the issue before the United States Supreme Court was whether the Fifth and Fourteenth Amendments prohibited the introduction into evidence of his admissions in a subsequent criminal prosecution. The Court initially noted that Murphy's obligation to appear and answer questions truthfully to his probation officer did not in itself convert Murphy's

voluntary statements into compelled ones. 465 U.S. at 427, 104 S. Ct. at 1142. In recognizing the general rule that an individual must affirmatively assert the privilege, the Court stated:

> Witnesses who failed to claim the privilege were once said to have "waived" it, but we have recently abandoned this "vague term," *Green v. United States*, 355 U.S. 184, 191[,] 78 S. Ct. 1178, 1182, 47 L.Ed.2d 370 (1957), and "make clear that an individual may lose the benefit of the privilege without making a knowing and intelligent waiver." *Garner v. United States, supra*, 424 U.S. at 654, n. 9, 96 S. Ct. at 1182, n.9.

465 U.S. at 427-428, 104 S. Ct. at 1142.

The Court recognized that application of this rule is inappropriate in certain situations where some identifiable factor "was held to deny the individual a 'free choice to admit, to deny, or to refuse." 465 U.S. at 429, 104 S. Ct. at 1143. Murphy argued that he fell within this exception on the grounds that if he was untruthful with his probation officer, revocation of his probation was threatened and, as such, he was "compelled" to make incriminating disclosures rather than claim the privilege. But the Court found no such factor in Murphy's case since Murphy was in "no better position than the ordinary witness at a trial or before a grand jury who is subpoenaed, sworn to tell the truth, and obligated to answer on the pain of contempt, unless he invokes the privilege and shows that he faces a realistic threat of self-incrimination." 465 U.S. at 427, 104 S. Ct. at 1142.

The threat of punishment for reliance on the Fifth Amendment privilege distinguishes "penalty" cases from

ordinary cases where a witness is merely require [sic] to testify truthfully. Murphy's probation condition only forbid false statements; it did not address his freedom to decline to answer certain questions and in no way suggested that his probation was conditional on waiving his Fifth Amendment privilege in regards to future criminal prosecution. 465 U.S. at 435-436, 104 S. Ct. at 1146-1147. Likewise, no direct evidence was presented that Murphy confessed because he feared probation revocation if he kept silent. The Court concluded that the State had not taken that one extra impermissible step and required Murphy to choose between incriminating himself and jeopardizing his conditional liberty by remaining silent. Thus, his Fifth Amendment privilege was not self-executing and the Court held that the Minnesota Supreme Court erred in excluding the testimony by the probation officer. 465 U.S. at 438-439, 104 S. Ct. 1147-1148.

Both *Murphy* and the instant case involve situations where a probationer failed to assert the privilege before revealing incriminating information. In the instant case, the source of Fuller's incriminating statements was verbal admissions made to his therapists in a sex offender treatment program, who then relayed the admissions to his probation officer, and written statements made in the course of and for the purpose of the program discovered during a search of his residence. Evidence seized during the search then led authorities to the witnesses of the prior offenses for which he is currently being prosecuted. In *Murphy*, the incriminating admissions were also made during the course of court-ordered treatment and communicated by the therapist to Murphy's probation officer.

Rather than through a search, the incriminating evidence was admitted by Murphy to the officer.

The record in *Murphy* indicated that conditions of Murphy's probation were to be involved in a treatment program and to be truthful in all matters to his probation officer. No further evidence existed to suggest that his freedom was conditional on a waiver of his right against self-incrimination or that Murphy confessed to the prior crimes because probation revocation was being threatened if he kept silent. In the instant case, the record indicates that conditions of Fuller's probation were to continue his participation in the outpatient sex offender program and to follow its policies and not terminate without prior approval. Another condition was that Fuller was to be administered polygraph examinations to assess his general honesty, but if he failed an examination, the condition specifies that the failure would not be cause for termination from the program. The parties stipulated to the fact that one policy of the program is to honestly disclose offending history and another policy is that the patient will be terminated if he re-offends. Fuller was terminated from the program and his probation was revoked for re-offending and, thus, violating conditions of his probation, not because of the occurrence of prior offenses.

Fuller is not unlike Murphy, or any other witness, who is obligated to speak truthfully, unless he invokes the privilege and shows a realistic threat of self-incrimination. Nothing in the record demonstrates that it was expressly communicated to Fuller either by his therapists or by his probation officer that he would be terminated from the program because he invoked his privilege. The

record is void of any evidence that Fuller admitted to prior crimes because he feared revocation of his probation if he chose to remain silent. Fuller could have invoked his privilege at the time of therapy and case law in Montana indicates the State would not have been allowed to penalize him on that basis. Moreover, Fuller has presented no statute or regulation which specifically provides for probation revocation if a probationer invokes his Fifth Amendment privilege during treatment. This Court finds the alleged compulsion is insufficient to qualify as coercive and to show that Fuller was "compelled" to admit to the prior sexual acts for which he is now being prosecuted. Thus, his privilege was not self-executing and was forfeited at the time he made the admissions. Upon the record as it stands, and upon the authority of *Minnesota v. Murphy*, this Court denies Fuller's Motion to Dismiss the Information on the grounds of the Fifth Amendment.

III. MOTION TO SUPPRESS STATEMENTS OF ALLEGED VICTIMS

Fuller moved to suppress statements taken from the alleged victims of the offenses with which he is currently charged. He claims that the Billings Police Department determined the identity and location of these victims, and obtained their statements, as a result of disclosures made during the course of his sex offender treatment. Fuller claims that because of the initial illegality in receiving the information about his disclosures, the police department located the victims.

In *Wong Sun v. United States*, the United States determined that evidence acquired through the exploitation of an initial illegality, and "not by facts sufficiently distinguishable to be purged of the primary taint," may not be used against the defendant. 83 U.S. 471, 83 S. Ct. 407, 417 (1963). However, this Court has concluded that the use of Fuller's admissions during the course of the treatment program would not be contrary to the mandate of *State v. Thiel* nor in violation of his right against self-incrimination. Because of the determination that no initial illegality occurred, this Court denies Fuller's Motion to Suppress the alleged victim's statements.

cc: County Attorney
Public Defender

Supreme Court, U.S.
FILED
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No. 96-264

In The

Supreme Court of the United States

October Term, 1995

STATE OF MONTANA,

Petitioner,

v.

MATTHEW C. FULLER,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Montana

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Has a defendant, under a reasonable belief that his probation could be revoked if he invoked his right to remain silent, been compelled by the state to incriminate himself in violation of his constitutional rights when he makes self-incriminatory statements as a mandatory condition of court-ordered outpatient treatment and the statements are then used against him in a separate, independent criminal proceeding?

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RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

In addition to the provision cited by Petitioner, the following is relevant:

Mont. Const. article II, section 25:

Self-incrimination and double jeopardy. No person shall be compelled to testify against himself in a criminal proceeding. . . .

Additional relevant Montana statutes are set forth in the Appendix.

STATEMENT OF THE CASE

The parties submitted this case to the state district court and, on appeal from a denial of a motion to dismiss the charging document, to the Montana Supreme Court on an agreed statement of facts. No other facts were considered by the court on appeal.

Matthew Fuller was charged in 1992 with three counts of attempted sexual assault.[1] He was convicted following a one-day bench trial.[2] Under state law, Fuller could have been sentenced to a minimum term of no less than two years on each count unless the sentencing court

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[1] Sections 45-4-103 MCA and 45-5-502(3) MCA.

[2] Fuller appealed his conviction to the Montana Supreme Court and his conviction was reversed on September 15, 1994. *State v. Fuller* 880 P.2d 1340 (1994).

Petitioner incorrectly states that the trial was by a jury. Pet. 2.

found that treatment of the defendant in the local community afforded a better opportunity for rehabilitation of the defendant and for the ultimate protection of society.[3] The sentencing judge made this finding and Fuller was sentenced to three concurrent terms of ten years in prison. The sentences were suspended upon the performance of certain conditions, including the condition that Fuller "shall obtain and/or continue his enrollment and participation" in an outpatient sexual offender treatment program. He was to follow "all policies of that program" and was not to terminate from the program without approval of his supervising officer. The sentencing order provided that should conditions of his probation be violated, a bench warrant would be issued and the defendant would be brought before the court for further proceedings.[4] A court-ordered sexual offender evaluation had been completed and provided to the court prior to sentencing.

Fuller was accepted into a treatment program which would not accept a patient who was in denial about his sexual problem or who did not honestly disclose his offending history. Further, patients who were in denial, who did not honestly disclose their offending histories, who re-offended during treatment, or otherwise violated the rules of the program were terminated from treatment.

Program employees had a duty imposed by state law to report to the proper authorities any evidence they

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[3] Sections 45-5-502(3) MCA and 46-18-222(6) MCA.

[4] As part of the order Fuller was also required to register as a sex offender under the then existing Montana statute. No issue is presented to the court respecting that requirement.

possessed in their official capacity that a child had been abused.

After admission, and as required by the program, Fuller revealed that he had sexually assaulted three minor girls in late 1992. The State of Montana incorrectly alleges that Fuller failed to comply with the program rules because he failed to make these disclosures as part of the evaluation process. The agreed statement of facts does not support this representation. Although the stipulated facts state Fuller did not disclose these incidents during his evaluation, it would be a mistake to assume that he did so without the knowledge of his therapist or that he did so to manipulate the system as alleged by the Petitioner. The sentencing court found that Fuller could be treated in the community based upon the sexual offender evaluation. Since the program did not accept individuals who denied the existence of a problem, it is reasonable to assume that the therapist was satisfied he had sufficient information to make his determination.

As he was also required to do, Fuller made the disclosures in writing. Copies of these documents were kept at his residence in Roundup, Montana.

Some time after the disclosures, Fuller's therapists wrote to one of his probation officers and questioned continuance of Fuller in the program for reasons other than the disclosures.[5] Because of the letter, one of the probation officers directed law enforcement in Roundup, Montana to conduct a search of Fuller's residence for

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[5] Appellant's Brief, Montana Supreme Court, Ex. F.

pornographic materials, videos, and written materials.[6] This search uncovered Fuller's writings which revealed details of the assaults, the first names and ages of the three girls as well as their addresses as of October 1992.

After he received these documents from law enforcement and at the direction of the local prosecutor, another probation officer turned the information over to the police.[7] The police located the girls named and obtained statements. Prior to the receipt of the written documents from the probation officer, the police department had absolutely no knowledge of these incidents[8] and had not pursued any independent investigation.

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[6] As a condition of his probation, Fuller was required to submit to reasonable searches of his person, residence and vehicle. Fuller, at the State court level, did not question the validity of the search clause, nor the validity of the search because it was conducted by someone other than his probation officer.

[7] The Petition at page 2 asserts that the disclosures were reported to the authorities by the therapists. On April 14, 1994 Fuller's therapists wrote a letter (Appellant's Brief Montana Supreme Court Ex. G) to Probation and Parole detailing the events set forth in their March 30th letter and informing probation about the disclosures. While it may be technically correct that the authorities were notified of the disclosures by the therapists the only information the police initially received were the documents seized during the search of Fuller's room. The letter dated April 14, 1996 was not turned over to the police and the police investigation of the incidents was predicated upon Fuller's written disclosures made during treatment.

[8] After the three (3) girls were assaulted and after Fuller had been charged initially in 1992 with three counts of attempted sexual assault, the girls reported the incidents to their families and the father of one of the girls called authorities to report the girls had been assaulted by someone known only

Fuller was subsequently charged with one (1) count of sexual intercourse without consent and two (2) counts of sexual assault.

After he was charged, Fuller moved at the State Court level to suppress his statements because his admissions were compelled in violation of his right against self-incrimination and he also moved the District Court to suppress the statements of the three girls on the basis of *Wong Sun v. United States* 371 U.S. 471 (1963). Fuller's motion to suppress his statements was denied and Fuller entered a guilty plea to the three charges, reserving his right to appeal the court's denial of his motion.[9] On appeal the Montana Supreme Court reversed the lower court's judgment. *State v. Fuller* 915 P.2d 809 (1996).

The majority opinion of the court emphasized that "resolution of Fuller's appeal will rest on Article II, Section 25 of the Montana Constitution, as well as the United States Supreme Court's interpretation of the Fifth Amendment." Pet. App. 5a. The majority concluded Fuller was faced with a "classic penalty situation" as described by this Court in *Minnesota v. Murphy*, 465 U.S. 420, 435 (1984). Unlike the factual situation addressed in *Murphy*, however, the majority concluded that Fuller's statements were compelled, even in the absence of an invocation of his right not to incriminate himself because he was forced by the court's treatment order to either

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to them at the time as "Matt". The father's call was transferred to three different departments and he eventually hung up the phone, feeling he was getting no assistance. No facts regarding the incidents were given to authorities at that time. Pet. App. 6b.

[9] Section 46-12-204(3) MCA.

make incriminating statements or remain silent and jeopardize his conditional liberty. While a prior state supreme court decision[10] precludes authorities from revoking one's probation based upon a refusal to admit guilt for a crime, the majority found, based on the facts, that Fuller had an "eminently reasonable" belief that the court would carry out its threat to revoke his probation if he did not obey its order to comply with the program's policies. The majority noted in conclusion that while it had addressed application of the Fifth Amendment, "this holding is also based separately and independently on Fuller's right to remain silent pursuant to Article II, Section 25 of the Montana Constitution." Pet. App. 17a. Two justices, agreeing entirely with the majority opinion, noted separately in a concurring opinion that, in their view, the state constitutional provision applied. Pet. App. 19a.

Three justices dissented because they concluded that Fuller was not presented with a "classic penalty situation," as the court would have been barred by state law from revoking his probation and sentencing him to prison if Fuller invoked his right and did not disclose his prior offense history. Pet. App. 26a-39a.

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[10] *State v. Imlay*, 813 P.2d 979 (1991), *cert. granted sub.nom. Montana v. Imlay*, 503 U.S. 905 (1992); *cert. denied as improvidently granted*, 113 S.Ct. 444 (1992) (*per curiam*).

REASONS FOR DENYING THE PETITION

I. THERE IS AN ADEQUATE AND INDEPENDENT STATE GROUND FOR THE DECISION OF THE MONTANA SUPREME COURT.

The majority opinion of the Montana Supreme Court stated that, even though considerable attention had been given to the United States Constitution in discussion of the issue presented, the decision was based "separately and independently" upon the applicable section of the Montana Constitution.

In *Michigan v. Long* 463 U.S. 1032, 1040-41 (1983) this court held that when a state court decision appears to rest primarily upon federal law or to be interwoven with federal law and when the adequacy and independence of the state court decision is not clear from the face of the opinion, this court will assume that the most reasonable explanation for the state court's decision is that the state court felt that federal law required it to rule in the manner it did.

This Court also held that it will not accept jurisdiction if the state court has merely relied upon federal authorities as it would upon case authority from other jurisdictions and the state court expressly states it is relying upon bona fide, separate and independent state grounds.

The fact that the Fifth Amendment and Montana's Article II, Section 25 are nearly identical does not automatically lead to a conclusion that the Montana Court based its decision upon the Fifth Amendment as opposed

to its own interpretation of its own constitutional provision. *Minnesota v. National Tea Company* 309 U.S. 551 (1940). The power of this court is to correct state judgments when they incorrectly adjudge federal rights. *Herb v. Pitcairn* 324 U.S. 117 (1945).

In this case, the Montana Supreme Court clearly stated it based its decision separately and independently upon Article II, Section 25 of the Montana Constitution. While the opinion does not contain a statement that the court is relying upon federal authority only for the purpose of guidance, such a statement clearly is not necessary since the Montana Court did not follow the decision in *Murphy*. Rather than follow the decision in *Murphy*, the Montana Supreme Court held that the facts present in *Murphy* were so dissimilar to those in *Fuller* to command a different result. The fact the Montana Supreme Court factually distinguished *Fuller* clearly indicates the Montana court did not feel required to follow *Murphy* and grounded its decision upon state law.

The Montana Court stated "[T]his court's decision is supported by the United States Supreme Court's interpretation . . . " Pet. App. 12a and not that the decision was controlled by such interpretation. This statement shows the Montana Supreme Court relied upon *Murphy* and the Fifth Amendment for evaluative purposes only and not as controlling authority.

II. THE QUESTION PRESENTED BY THE PETITIONER HAS NO BASIS IN THE DECISION OF THE MONTANA SUPREME COURT.

The question presented was not decided by the Supreme Court of Montana and provided no basis for its decision.

The question posed by Petitioner is premised on the inaccurate representation that a person serving a probationary sentence *voluntarily* enters a sexual offender treatment program as a condition of probation. Petitioner repeatedly asserts that there was an offer of leniency and that Fuller entered into "an arrangement", or was party to some type of agreement, when he was sentenced. At sentencing, the State asked for a total of eighteen years in prison.[11] Although Fuller at sentencing asked the court for a suspended sentence, that certainly cannot be classified as an agreement or arrangement. The state trial court ordered Fuller to successfully complete the treatment program. If he did not complete the program, an arrest warrant would be issued and his probation would be revoked.[12]

Petitioner's first ground for issuance of a writ is predicated upon its argument that there was some sort of

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[11] Tr. of sentencing hearing p. 194.

[12] Under Montana law, since treatment in a community based treatment program is the only way a defendant can avoid a mandatory minimum prison sentence, termination from a treatment program would automatically lead to revocation of a suspended sentence and incarceration. *Fuller* differs from *Murphy* in that Murphy did not face automatic revocation under Minnesota law. *Murphy* 465 U.S. at 438.

agreement. The cases cited by the Petitioner are factually and doctrinally inapposite to the facts and issues in this case.

The question presented provided no basis for the lower court's decision, or for the stipulated facts upon which this case was presented below. This is not an appropriate case for exercise of the writ of *certiorari*.

III. THE MONTANA SUPREME COURT DID NOT ERR IN ITS ANALYSIS OF *MINNESOTA V. MURPHY*.

The Montana Supreme Court did not misinterpret this Court's holding in *Minnesota v. Murphy*. The Petitioner's complaint about the Montana Supreme Court's decision is not so much with the manner in which the Montana court interpreted *Murphy* as it is with the way the court applied *Murphy* to the facts.

This court historically has been reluctant to grant review in cases in which the federal law or rule has been correctly interpreted by the State court but, perhaps, misapplied. Rule 10 Rules of the Supreme Court provides, in part, "[A] petition . . . is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."; See also *Minnesota v. Olson* 495 U.S. 89, 100 (1990) ("We are not inclined to disagree with this fact-specific application of the proper legal standard.") ("I interpret the last two paragraphs of Part III as deference to a state court's application of the exigent circumstances test to the facts of this case, and not as an endorsement of that particular application of the standard. . . . " Kennedy, J., concurring

at 403 U.S. 102.) *Zacchini v. Scripps-Howard Broadcasting Co.* 433 U.S. 562, 566, (1977) (" . . . our power is to correct wrong judgments, not to revise opinions.").

A few courts have decided issues identical to the one presented here and, with the exception of one court, have adopted position startlingly similar to that of the Montana Supreme Court.[13] The similarity in rationale between the courts demonstrates the Montana court did not misinterpret *Murphy* and that a conflict of jurisdictions does not exist.[14] Supreme Court Rule 10.1 provides a writ will be granted " . . . only when there are special and important reasons therefor."

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[13] See Pet. 11 n. 2. *State v. Tenbusch* 886 P.2d 1077 (Or. Ct. App., 1994) is the only case cited which ruled contrary. The *Tenbusch* ruling was by the Oregon Court of Appeals. Review of that decision was denied on February 28, 1995. *Husske v. Commonwealth* 448 S.E.2d 331 (Va. Ct. App., 1994), opinion vacated without opinion 462 S.E.2d 120 (Va. Ct. App., 1995) is presently before the Virginia Supreme Court, Record No. 95-1880.

[14] *Mace v. Amstoy* 765 F. Supp. 847, 851 (1991) ("The instant case is distinguishable from *Murphy*. The condition of petitioner's probation, as interpreted, did go beyond a prohibition against falsehood. It actually required admission of sexual intercourse – a criminal act for which petitioner could be prosecuted. . . . "); *Gyles v. State* 901 P.2d 1143, 1149 (Alaska, 1995) ("As the Vermont Supreme Court recently held: 'If the questions asked of a probationer call for answers that would incriminate him in a pending or later criminal prosecution, the State will have created the classic penalty situation if it asserts, either expressly or by implication, that an invocation of the privilege would result in probation revocation.' " *State v. Eccles* 877 P.2d 799, 801 (Ariz., 1994) ("The state may not force defendant to choose between incriminating himself and losing his probationary status by remaining silent. . . . ").

The state invites this Court to "clarify" *Murphy* because, it suggests, its then-attorney general misunderstood the case when he argued in another case before this Court that a probationer in Montana would enjoy immunity from prosecution for incriminating statement made during court-ordered therapy. Pet. 9 n. 1. It is patently obvious, however, that the previous attorney general was correct.

Murphy provides as follows:

> Our cases indicate, moreover, that a State may validly insist on answers to even incriminating questions and hence sensibly administer its probation system, as long as it recognizes that the required answers may not be used in a criminal proceeding and thus eliminates the threat of incrimination. Under such circumstances, a probationer's 'right to immunity as a result of his compelled testimony would not be at stake,'. . . .

Murphy 465 U.S. at 435-36 n. 7 (citations omitted.)

The Montana Supreme Court did not misread *Murphy* in this regard. The court noted the State may insist upon answers to incriminating questions, but it must also realize that it may not use those compelled answers against a defendant in a later criminal proceeding. Pet. App. 17a.

Nor did the Montana Supreme Court misread *Murphy* with respect to its analysis of how a State creates the "classic penalty situation". *Murphy* held the classic penalty situation is created by a state if it asks incriminating questions and expressly or by implication threatens to revoke probation if the defendant asserts his right against self-incrimination. In that instance, assertion of the right

is excused and the compelled answers cannot be used against the probationer in a later criminal prosecution. *Murphy* 465 U.S. at 435.

The Petitioner incorrectly states at page 11 that critical to the holding of *Murphy* was the finding that a sanction for assertion of the right against self-incrimination had actually been imposed. The impermissible action of the state is a threat to punish a defendant for invocation of the right against self-incrimination. *Murphy* 465 U.S. at 435. The Montana Supreme Court clearly recognized this. Pet. App. 9a and 11a.

Whether state intends to follow through upon a threat or whether they would be successful if they attempted to follow through upon the threat are immaterial in determining whether the classic penalty situation has been created. *Gardner v. Broderick* 392 U.S. 273, 279 (1968) (". . . the mandate of the great privilege against self-incrimination does not tolerate the attempt, regardless of its ultimate effectiveness, to coerce a waiver of the immunity it confers on penalty of the loss of employment."); *Murphy* 465 U.S. at 444 ("The State's attempt to coerce self-incriminating statements by promising to penalize silence is itself constitutionally offensive. . . . ") (Marshall, J., dissenting.)

The privilege extends to disclosures a defendant reasonably believes could be used against him in a subsequent criminal proceeding.

The specific holding in *Murphy* was that the State of Minnesota did not create the classic penalty situation because it did not require Murphy to choose between making incriminating statements and jeopardizing his

conditional liberty by remaining silent. *Murphy* 465 U.S. at 436. Recognizing the validity of that holding, Pet. App. p. 16a, the Montana Supreme Court made a determination that the facts in *Fuller* led it to reach a different conclusion in the state case then before it. The Montana Supreme Court's conclusion below was nothing more than a fact specific application of *Murphy* to the case before it. The Court found that the questions asked Fuller were specifically directed at him to obtain incriminating information whereas the questions asked Murphy were more general. The Montana Court made a factual determination, based on the stipulated facts, that unlike the questions posed in *Murphy*, the situation confronting Fuller "call[ed] for answers that would incriminate him in a pending or later prosecution." *Fuller*, citing *Murphy*, Pet. App. 14a.

IV. THE DECISION OF THE MONTANA SUPREME COURT PROMOTES EFFECTIVE IMPLEMENTATION OF THE STATE OF MONTANA'S POLICY REQUIRING TREATMENT OF SEX OFFENDERS.

The Petitioner alleges that this court should grant its request because the decision of the Montana Supreme Court effectively prevents the State of Montana from being able to protect the public safety (Pet. 14) and the use of community based treatment facilities will be threatened. Should this decision be allowed to stand, Petitioner argues prosecutors will be unable to protect public safety when it is in danger. (Pet. 14) They argue the Montana Supreme Court has granted use immunity to offenders once they are in treatment thereby destroying the State's " . . . ability to act later in the interests of

public safety" (Pet. 14), for example, when the offender is "actively reoffending" or discloses additional offenses.

Murphy recognizes immunity must be given when the State insists upon answers to the most incriminating questions. *Murphy* 465 U.S. at 435-36 n. 7. However, immunity would not extend to offenses committed by the defendant while he was in treatment or offenses committed by him after sentencing. The only answers that are compelled are answers concerning sexual offending history.

The argument by the Petitioner overlooks, also, the fact the State is not completely precluded from prosecuting the defendant for crimes that occurred in the past if it can demonstrate that the crimes would have been discovered inevitably, that the State's knowledge came from an independent source and investigation has been continuing or that any taint caused by the compelled disclosures has been attenuated by the passage of time.[15] See also the concurring opinion of Trieweiler, J. at Pet. App. 24a.

Petitioner's stance further overlooks the manner in which a treatment program functions. It is reasonable to

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[15] Petitioner in this case took exactly this position at the District Court level in response to Respondent's motion filed after the Montana Supreme Court's opinion to suppress the statements of the three girls under the doctrine of *Wong Sun v. United States*. See State of Montana's Response to Defendant's Motion to Dismiss Case and Release Defendant.

assume that a therapist, given the hypothesis the Petitioner fears, would terminate a defendant from the treatment program and public safety could, at the very least, be protected by the use of revocation proceedings.[16]

At the bottom of page 8, Petitioner suggests it should be given the absolute power " . . . to use the threat of probation revocation for assertion of the privilege if it is to administer its treatment programs." This suggestion directly contradicts *Murphy*.

Montana has recognized the necessity of honest disclosures in order for there to be admission to a treatment program and for the programs to be effective. (Pet. App. 23a) It is difficult to comprehend how effective a treatment program could be if a defendant were forced to admit past crimes without immunity, thereby exposing himself to punishment not only for the current offense, but, also, for offenses in the past.[17]

In cases involving sexual crimes committed against minor children, Montana law requires that an evaluation be conducted and that evaluation contain a recommendation for treatment.[18] Without an evaluation and barring

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[16] In this case, exactly that happened. The defendant violated certain conditions of the program and a letter was sent to the probation department advising them of this fact. The State thereupon took measures to petition for revocation of his sentence which the court did do, sentencing the defendant to ten years in prison. See Pet. App. 4b.

[17] Section 45-1-205(1)(b) MCA provides that the statute of limitation for sexual offenses committed against minor children is five years after the date the child attains the age of eighteen.

[18] Section 46-18-111 MCA.

acceptance into a community treatment program, a defendant faces mandatory prison time.[19]

Montana has established the above policy by statute. The Petitioner's position – everyone who enters a program can be charged with what they admit to and can be punished for assertion of the privilege – thwarts this policy. If an offender were required to admit past sexual offenses, with no promise of immunity for those offenses, which offender would take the chance he/she might be prosecuted for both present and past offenses? If disclosures of criminal conduct during the evaluation and/or treatment process can be used by a prosecutor at his discretion to file further criminal charges, the effectiveness of any treatment program will be jeopardized.

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[19] Sections 45-5-502(3) MCA, 46-18-201(5) MCA, 46-18-222(6) MCA.

CONCLUSION

For the reasons above, it is respectfully submitted that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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APPENDIX

Montana Code Annotated § 45-1-205(1). General time limitations. (1) (a) A prosecution for deliberate, mitigated, or negligent homicide may be commenced at any time.

(b) A prosecution under 45-5-502 through 45-5-505, 45-5-507, 45-5-625, or 45-5-627 may be commenced within 5 years after the victim reaches the age of 18 if the victim was less than 18 years old at the time that the offense occurred.

Montana Code Annotated § 45-4-103. Attempt. (1) A person commits the offense of attempt when, with the purpose to commit a specific offense, he does any act toward the commission of such offense.

Montana Code Annotated § 45-5-502. Sexual assault. (3) If the victim is less than 16 years old and the offender is 3 or more years older than the victim or if the offender inflicts bodily injury upon anyone in the course of committing sexual assault the offender should be imprisoned for a term of not less than 2 years or more than 40 years and may be fined not more than $50,000.

Montana Code Annotated § 46-12-204. Plea alternatives. (3) With the approval of the court and the consent of the prosecutor, a defendant may enter a plea of guilty, reserving the right, on appeal from the judgement, to review the adverse determination of any specified pretrial motion. If the defendant prevails on appeal, the defendant must be allowed to withdraw the plea.

Montana Code Annotated § 46-18-111. Presentence investigation – when required. (1) Upon the acceptance

of a plea or upon a verdict or finding of guilty to one or more felony offenses, the district court shall direct the probation officer to make a presentence investigation and report. The district court shall consider the presentence investigation report prior to sentencing. If the defendant was convicted of an offense under 45-5-502, 45-5-503, 45-5-504, 45-5-505, 45-5-507, 45-5-625 involving a victim who was less than 16 years of age when the offense was committed, the investigation must include an evaluation of the defendant and a recommendation as to treatment of the offender in the least restrictive environment, considering community safety and offender needs. The evaluation must be completed by a person who is determined to be qualified under guidelines established by the department of corrections. All costs related to the evaluation must be paid by the defendant. If the defendant is determined by the district court to be indigent, all costs related to the evaluation are the responsibility of the district court and must be paid by the county or the state, or both, under Title 3, chapter 5, part 9.

(2) Unless the court makes a finding that a report is unnecessary, a defendant convicted of any offense not enumerated in subsection (1) that may result in incarceration for 1 year or more may not be sentenced before a written presentence investigation report by a probation officer is presented to and considered by the district court. The districts court may, in its discretion, order a presentence investigation for a defendant convicted of a misdemeanor.

Montana Code Annotated § 46-18-201. Sentences that may be imposed.

(5) Except as provided in 45-9-202 and 46-18-222, the imposition or execution of the first 2 years of a sentence of imprisonment imposed under the following sections may not be deferred or suspended: 45-5-103, 45-5-202(3) relating to aggravated assault, 45-5-302(2), 45-5-303(2), 45-5-401(2), 45-5-502(3), 45-5-503(2) and (3), 45-9-101(2), (3), and (5)(d), 45-9-102(4), and 45-9-103(2).

Montana Code Annotated § 46-18-222 (6). (Effective July 1, 1997) Exceptions to mandatory minimum sentences and restrictions on deferred imposition and suspended execution of sentence. All mandatory minimum sentences prescribed by the laws of this state and 46-18-219 and the restrictions on deferred imposition and suspended execution of sentence prescribed by 46-18-201(5) through (7), 46-18-221(3), 46-18-224, and 46-18-502(3) do not apply if:

(6) the offense was committed under 45-5-502(3) and the court determines that treatment of the defendant in a local community affords a better opportunity for rehabilitation of the defendant and for the ultimate protection of the victim and society, in which case the court shall include in its judgment a statement of the reasons for its determination.

(3)

Supreme Court, U.S.
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No. 96-264

In The

Supreme Court of the United States

October Term, 1995

STATE OF MONTANA,

Petitioner,

v.

MATTHEW C. FULLER,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Montana

BRIEF OF AMICI CURIAE STATES OF KANSAS, IDAHO, OKLAHOMA, SOUTH DAKOTA AND VIRGINIA IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*

The states administer criminal justice systems that are being called upon to deal with an unprecedented number of offenders for whom sex offender treatment programs are determined by sentencing courts to be important conditions of probationary release or other lenient sentencing alternatives. Sex offender treatment programs can be effective in reducing recidivism for these offenders, but only if the offenders comply with the conditions of participation in the program. The holding of the Montana Supreme Court in this case threatens the effectiveness of court-ordered sex offender treatment by eliminating the ability of prosecutors to respond to disclosures made during treatment which indicate the offender poses a greater threat to society than believed at the time of sentencing. The holding is based on the Fifth Amendment to the Constitution of the United States, which applies to all states. The result of extension of this rule, as a federal constitutional principle, to the amici states would be the significant curtailment of court-ordered sex offender therapy as an alternative to lengthy periods of incarceration for sex offenders, creating additional incarceration costs for the states and eliminating a humane alternative to incarceration for these offenders. The holding fails to accord proper weight to the decisions of this Court construing the Fifth Amendment and the conditional liberty interests of probationers. For the reasons that follow, the amici states respectfully urge the Court to grant the writ and reverse the Montana Supreme Court's decision.

SUMMARY OF ARGUMENT

Sex offender treatment programs require a commitment from the offender that he[1] will honestly disclose certain information regarding his past conduct. In the Montana program at issue in this case, Respondent was expected to make these disclosures on two occasions, once in the initial intake process that determined his eligibility for the program, and again during the therapy itself. His willingness to make the disclosures was an implicit requirement of his eligibility for the treatment program and, therefore, of the probationary sentence he received. He made certain disclosures which were reported to law enforcement authorities as required by Montana law. Mont. Code Ann. § 41-3-201 (1993). The Montana Supreme Court, in effect, created a rule requiring the States to extend use immunity to an offender for such disclosures as a matter of federal constitutional law under the Fifth Amendment.

The right to avoid self-incrimination under the Fifth Amendment must generally be asserted or it is deemed waived. While this Court has identified a limited class of cases in which the privilege is deemed to be "self-executing", this case does not, contrary to the Montana Supreme Court's decision, fit within that category. Respondent was not placed in a "classic penalty situation" by a requirement that he waive his right to remain silent in exchange for lenient treatment at sentencing.

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[1] Studies show that sex offenders are overwhelmingly male, but share few other common traits. A. Salter, *Transforming Trauma* at 26-33 (1995).

State courts afford sentencing leniency to sex offenders who comply with treatment programs because of a belief that the treatment programs provide sufficient protection to the community to justify an alternative to the offender's incarceration. If the offender is unwilling to make the disclosures that are necessary to the treatment program's effectiveness, the offender does not belong in the program and must be dealt with through other penal alternatives that will provide sufficient protection to the community. While the choice to enter the program and make the required disclosures may be a difficult one for an offender with a history of uncharged offenses, the amici states submit that it is not a choice that renders the Fifth Amendment privilege self-executing. Simply put, the Constitution does not require the states to extend use immunity to a sex offender for disclosures made during the course of his participation in a sex offender treatment program that is offered to the offender as a condition of a probationary sentence.

ARGUMENT

I. Probationary Sentences Conditioned On The Defendant's Participation In Sex Offender Treatment Programs That Require Offenders To Disclose Prior Offenses Are Prevalent.

Respondent's case illustrates a procedure that is common in the amici states. An offender is before the court for sentencing on a sex offense. The offense of which he has been convicted allows the sentencing court a number of sentencing alternatives, ranging from a lengthy period of incarceration to suspension or deferral of sentence

upon the offender's agreement to comply with certain probationary conditions. *See Griffin v. Wisconsin*, 483 U.S. 868, 874 (1987) ("Probation is simply one point (or, more accurately, a set of points) on a continuum of possible punishments ranging from solitary confinement in a maximum-security facility to a few hours of mandatory community service.")

For several reasons, probationary sentences are attractive for such offenders, at least those without a history of violent offenses. Often the state's penalogical goals will be advanced by requiring the offender to provide restitution to victims for medical and counselling costs incurred as a result of the offender's conduct. Restitution is not a realistic alternative when the offender is incarcerated. Probationary sentences allow the offender to remain in the community, where he may work and continue to support his family. Moreover, studies show that untreated sex offenders re-offend at a high rate. A. Salter, *Transforming Trauma* at 5-13 (1995) (collecting and summarizing studies). Treatment programs may be much more available in a community setting than an institutional one, and in the community setting they can more readily be provided at the offender's expense. The availability of treatment programs facilitates plea negotiation in this class of cases in which convictions after trial may be difficult to obtain, and may be obtainable only at the cost of further traumatization of child victims through required court testimony. Finally, courts perceive that incarceration presents management challenges for institutions where sex offenders are housed.[2]

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[2] It is the experience of the amici states that incarcerated sex offenders, especially those who have offended against

Balanced against these factors is the paramount requirement that the sentencing court protect the community from the danger that sex offenders will re-offend. Incarceration protects that interest in the near term, but since virtually all sex offenders will at some point become eligible for release into the community, incarceration without treatment cannot protect the community in the long term.

Courts in the amici states perceive sex offender treatment as a condition of probationary release as a means of serving both these interests. The probationary release allows the offender to remain in the community, to work, to continue to support his family, and to pay restitution to the victim. The treatment program provides a realistic measure of protection for the community by providing a mechanism to monitor the sex offender's conduct and to modify that conduct to eliminate or greatly reduce the chance that the offender will re-offend.[3] *See Griffin*, 483 U.S. at 875 (recognizing that probation conditions serve the dual purpose of promoting rehabilitation of the offender and protecting society.)

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children, are disproportionately the victims of violent acts by other inmates, and also offend against institutional regulations at a high rate.

[3] The amici states are aware that research on the efficacy of sex offender treatment programs in reducing recidivism for sex offenders is inconclusive. *See, e.g.*, P. Finn, *Do Sex Offender Treatment Programs Work?*, 78 Judicature No. 5 at 250 (Mar.-Apr. 1995). Nevertheless, it continues to be the judgment of sentencing courts in the amici states that such programs are appropriate as part of the regimen of probation conditions for sex offenders in many cases.

Most sex offender treatment programs, including the one in which Respondent enrolled, require the offender to make certain candid disclosures of prior offenses, including the offense for which the offender has been placed in the program. In many programs, the treatment providers will not accept for treatment persons who are "in denial", *i.e.*, who are unwilling to admit the full extent of their offending history. The offender's acceptance of responsibility for the consequences of his past conduct is, in these programs, an important aspect of the therapy's success. Thus, the offender's willingness to disclose information regarding prior offenses, whether those offenses have been charged or not, is an important factor in the offender's eligibility for the program. Accordingly, prosecutors in the amici states are reluctant to recommend probation for offenders who are unwilling to make these disclosures.

States also have a significant interest in the protection of the community in the short term and in the punishment of those who offend against society. Offenders sometimes make disclosures in therapy which indicate that they cannot be safely left at large in the community. Respondent's case is a good example. He was originally sentenced to probation, conditioned on his participation in a sex offender treatment program, for conduct which consisted of making sexually suggestive and threatening comments to young girls. *See State v. Fuller*, 880 P.2d 1340, 1341-42 (Mont. 1994). The offenses he disclosed in therapy were of an entirely different order of magnitude, involving actual non-consensual sexual intercourse with children. Pet. App. 4a. The sentencing court took note of the more serious nature of these offenses by

sentencing Respondent to a period of incarceration following his conviction for the more serious offenses. The Montana Supreme Court's decision essentially eliminates the ability of states to take this kind of action based on information provided by a sex offender during treatment.

II. The Montana Supreme Court's Decision Fails To Recognize And Give Effect To This Court's Decisions Holding That Sentencing Leniency May Be Exchanged For Relinquishment Of Rights Guaranteed By The Constitution.

Certainly, the State of Montana could not compel Respondent's agreement to make these disclosures had he been unwilling to do so. The Fifth Amendment guarantees that he could assert his right to remain silent and to refuse to make any statements to treatment providers regarding the offenses for which he had been sentenced and any other offenses he had committed. Just as certainly, however, the Constitution does not require Montana to afford Respondent leniency in sentencing if he is unwilling to satisfy the court's requirements that qualify him for lenient treatment. This is true even where, as here, the offender's willingness to provide certain information is a necessary condition of the offender's qualification for leniency. The laws of the amici states confer substantial discretion on sentencing judges in adopting conditions of probationary sentences. For example Kan. Stat. Ann. § 21-4610 (1995). It is widely recognized that probationers do not enjoy the full range of constitutional privileges, and that conditions of probation may authorize actions by law enforcement officials with respect to

probationers that would violate the constitutional rights of persons free from penal supervision.

For example, one of the most common probation conditions in the amici states is a requirement that probationers submit to warrantless search on reasonable grounds at the request of probation officers or law enforcement officials.[4] This Court has rejected arguments that such restrictions violate the Fourth Amendment. *Griffin*, 483 U.S. at 875 (probation supervision is a " 'special need' of the State permitting a degree of impingement upon privacy that would not be constitutional if applied to the public at large.") Courts have even approved probation restrictions that burden First Amendment rights where justified by important penal objectives. *United States v. Turner*, 44 F.3d 900 (10th Cir.), *cert. denied*, 115 S. Ct. 2250 (1995).

Amici submit that the Court's decisions dealing with plea bargaining are also instructive here. Like a plea bargain, an imposition of probation involves the agreement, or at least the acquiescence, of the offender to the surrender of certain liberty interests in exchange for an expectation of leniency in sentencing. Negotiated pleas always involve some measure of relinquishment of the offender's Fifth Amendment right to remain silent, *Brady v. United States*, 397 U.S. 742, 748 (1970), but the Court has consistently rejected the claim that an offer of leniency in

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[4] A similar requirement exists in federal sentencing law. 18 U.S.C. § 3563(a)(4) requires drug offenders to submit to warrantless drug testing. Seizure of breath and bodily fluids for chemical analysis is a search for Fourth Amendment purposes. *Schmerber v. California*, 384 U.S. 757 (1966).

charging or sentencing to induce the plea, and the concomitant waiver of the defendant's silence, constituted unconstitutional coercion. *See, e.g., Corbitt v. New Jersey*, 439 U.S. 212 (1978) (upholding statutory scheme that provided mandatory penalty only after trial); *Bordenkircher v. Hayes*, 434 U.S. 357 (1978) (imposition of additional charges after failure of plea bargain not unconstitutional).

Like the beneficiary of a plea bargain, Respondent received lenient treatment at sentencing through his acquiescence in certain conditions of probation. Without that acquiescence, it is not mere speculation to observe that a court might well have been unwilling to leave him at large in the community. One of the conditions in which he acquiesced was the obligation to disclose, as part of his sex offender therapy, his offending history as pertains to the sexual crimes with which he was charged. That obligation was not placed on him with the purpose of incriminating him further – its purpose was to ensure that he was willing to accept responsibility for his acts and that he was not "in denial", both conditions of eligibility for the sex offender treatment program. However, neither was he assured, either in fact or by a provision of state law, that he would not be prosecuted if he disclosed incriminating information.

Under these circumstances, the Montana Supreme Court erred in holding that Respondent's disclosures were anything other than voluntary, and specifically in holding that use of his statements made in the course of the treatment program was barred by the Fifth Amendment in the absence of a timely assertion of the privilege.

The Montana court's decision makes sex offender treatment as a condition of a probationary sentence a difficult proposition for a prosecutor or a sentencing court. Unless both are willing to immunize a defendant from prosecution based on disclosures made in treatment, probation conditioned on participation in the treatment will not be a viable sentencing alternative.[5]

III. The Court's Decisions Identifying The Few Situations In Which The Fifth Amendment Privilege Is Self-executing Do Not Support The Montana Court's Decision.

The text of the Fifth Amendment states that a person may not be compelled in a criminal case to be a witness against himself. In *Minnesota v. Murphy*, 465 U.S. 420 (1984), the Court summarized its case law on the question of whether the Fifth Amendment privilege may be claimed by a person who voluntarily testifies and does

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[5] The sentencing court's dilemma is compounded if the Montana Supreme Court's decision in *State v. Imlay*, 813 P.2d 979 (Mont. 1991), *cert. dismissed*, 113 S.Ct. 444 (1992) correctly states the law. In *Imlay*, the Montana court held that once an offender is admitted to treatment, a court may not revoke his probation if he asserts his Fifth Amendment privilege and refuses to comply with the treatment program's requirement that he accept responsibility for his crime and disclose his offending history. Thus, under *Imlay* and the case at bar, when an offender enters a treatment program as a condition of probation, the sentencing court cannot enforce through revocation of probation the requirement that the offender comply with the program. Moreover, the offender cannot be prosecuted for offenses he discloses if he does comply.

not timely invoke the privilege. The Court first recognized the general rule that "in the ordinary case, if a witness under compulsion to testify makes disclosures instead of claiming the privilege, the government has not 'compelled' him to incriminate himself." 465 U.S. at 427, *quoting Garner v. United States*, 424 U.S. 648, 654 (1976). The Court then identified three categories of cases in which exceptions to the general rule have been recognized: (1) custodial interrogation requiring *Miranda* warnings; (2) cases in which the offender is threatened with punishment for his reliance on the privilege; and (3) cases in which a taxpayer refuses to file a gambling tax return.

The first and third of these exceptions are obviously inapplicable here. The exception for gambling tax cases has been narrowly construed, as *Murphy* clearly shows. 465 U.S. at 439-40. The Court in *Murphy* further explained that an interview with a probation officer was not an inherently coercive setting sufficiently similar to custodial interrogation to trigger Fifth Amendment protections similar to those required in *Miranda v. Arizona*, 384 U.S. 436 (1966). 465 U.S. at 429-33. Conversations between an offender and a treating professional in a sex offender treatment program are if anything even more attenuated from the concerns which surround custodial interrogation. In the treatment setting the offender will in every case have been afforded the opportunity to consult with counsel during sentencing regarding the need to make disclosures about his prior conduct during the treatment program. The treatment program's objective is to correct the offender's behavior, not to elicit further incriminating information from him. *Murphy*'s holding that *Miranda* is inapplicable to meetings with a probation officer should

also foreclose its application to sex offender treatment programs. *See Murphy*, 465 U.S. at 433.

The amici states further submit that this case does not present a "classic penalty situation" which would render the Fifth Amendment self-executing. *Murphy* suggests in *dicta* that revocation of probation could in some circumstances be a "penalty" which excuses the failure to assert the Fifth Amendment privilege. 465 U.S. at 435-40. However, the amici states respectfully submit that the discussion of the probation condition at issue in *Murphy* should not be applied to the special situation presented by Respondent's case – a sex offender whose liberty is conditioned on his participation in a program the successful completion of which is deemed by the sentencing court to be essential to the security of the community.

None of the cases in which this Court has held that the threat of a penalty rendered the Fifth Amendment self-executing involved sex offenders placed at liberty in the community on the condition that they make certain disclosures, some of which could clearly be incriminating in matters other than the one in which the probationary sentence was imposed. The cases cited in *Murphy* included several in which employment consequences were considered to be "penalties", such as *Lefkowitz v. Cunningham*, 431 U.S. 801 (1977) (statute requiring removal from political office as penalty for assertion of Fifth Amendment privilege in grand jury proceedings), *Lefkowitz v. Turley*, 414 U.S. 70 (1973) (statute disqualifying public contractor for assertion of Fifth Amendment privilege in grand jury proceedings), *Uniformed Sanitation Men Ass'n v. Commissioner of Sanitation*, 392 U.S. 280 (1968) (city charter provision requiring discharge from

employment of persons asserting Fifth Amendment privilege), *Gardner v. Broderick*, 392 U.S. 273 (1968) (same), and *Garrity v. New Jersey*, 385 U.S. 493 (1967) (threatened discharge of police officers for refusal to respond to questions regarding official duties). In none of these cases could the person claiming the benefit of the privilege assert only a "conditional liberty" interest such as the one enjoyed by a probationary sex offender. *See Griffin*, 483 U.S. at 874, *quoting Morrissey v. Brewer*, 408 U.S. 471, 480 (1972).

The Court in *Murphy* also cited its prison discipline decision in *Baxter v. Palmigiano*, 425 U.S. 309 (1976), in which it had held that the Fifth Amendment was not offended by prison disciplinary rules allowing a decision-maker to draw adverse inferences from a prisoner's assertion of the right to remain silent. Amici submit that *Baxter* actually supports in some respects the position asserted by Montana in this case. The Court in *Baxter* recognized that in a formal criminal prosecution the drawing of adverse inferences from an assertion of the privilege would be forbidden. 425 U.S. at 317, *citing Griffin v. California*, 380 U.S. 609 (1965). The Court found, however, significant differences between assertion of the Fifth Amendment privilege in the context of a criminal prosecution and in a prison disciplinary proceeding. 425 U.S. at 317-18.[6]

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[6] Concededly, the Court in *Baxter* did indicate that inmates must be offered use immunity to prevent a State from using in a future criminal proceeding statements made by an inmate at a disciplinary hearing in which adverse inferences could be drawn from an assertion of the right to remain silent. 425 U.S. at 316. However, the Court cited only the employment cases in

Similarly, amici submit that significant differences exist between the assertion of a Fifth Amendment privilege by an employee or officer who has been convicted of no crime and whose liberty interests are unconditioned and the assertion of that right by a probationary offender who has reaped the benefits of a probationary release conditioned on his willingness to comply with the conditions of a treatment program. In the latter case, the offender is only being required to do that which he agreed to do as a condition of his being granted a less onerous criminal sentence by a sentencing court. This is an entirely different kind of "compulsion" from that which was applied in the employment cases, because it is compulsion to which the offender voluntarily agreed to submit in exchange for a tangible benefit at sentencing.

Just as the Constitution does not prevent a State from requiring an offender to waive certain constitutional protections as part of a plea bargain, amici submit it does not prevent a State from requiring an offender to disclose information to therapy providers that the providers have determined they need to effectuate the therapy. If the offender chooses to accept the benefits of such a probationary program, he ought to be required to comply with its obligations as well. When he does so, his compliance cannot fairly be said to have been "compelled" for purposes of Fifth Amendment analysis. The Court should grant review of the Montana Supreme Court's contrary

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support of that proposition. Amici submit that a different rule should apply in the limited context of statements made in sex offender treatment programs in which an offender agrees to enroll as a condition of probation.

decision in this case to clarify the import in this context of *Murphy* and the cases cited therein.

CONCLUSION

The amici states respectfully urge the Court to grant Montana's petition for certiorari in this case. The case presents an important issue of constitutional law under the Fifth Amendment which has not been, but should be, decided by this Court.

Respectfully submitted,

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In The

Supreme Court of the United States

October Term, 1995

STATE OF MONTANA,

Petitioner,

v.

MATTHEW C. FULLER,

Respondent.

On Petition For A Writ Of Certiorari
To The Supreme Court Of The State Of Montana

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

The brief in opposition filed by Respondent erroneously contends that the petition for writ of certiorari should be denied because the state court relied upon an adequate and independent state ground; because the question presented has no basis in the Montana Supreme Court's decision; because the Montana Supreme Court did not err in its analysis of *Minnesota v. Murphy*; and because the Montana Court's decision promotes effective implementation of the state's policy requiring treatment of sex offenders.

I.

Recognizing that *Michigan v. Long*, 463 U.S. 1032 (1983), requires an affirmative statement that the state court is relying upon federal authority for the purpose of guidance only, Respondent contends that such a statement is unnecessary here because the Montana Supreme Court did not follow the decision in *Minnesota v. Murphy*, 465 U.S. 420 (1984). It is interesting to note that, later in his brief (Opp. Br. at 10-11), Respondent argues that the Montana Court correctly interpreted *Murphy* and simply applied it to these facts, so there is no need for this Court to grant review. Notwithstanding the inherent inconsistency between these two positions, Respondent is incorrect that the Montana Court's decision rests upon an adequate and independent state ground.

Nowhere in the opinion does the Montana Court affirmatively show that federal authority was merely considered persuasive as required by *Michigan v. Long*. In fact, the opinion states at one point that the Court's

holding is based on the Fifth Amendment, and no state law principles independent of the federal are discussed, let alone applied. (Pet. App. 17a.)

It is clear from the opinion that the Montana Supreme Court was compelled to reach its conclusion because of a fundamental misunderstanding of this Court's decision in *Minnesota v. Murphy*, not because of any independent rule of state constitutional law. The Montana Court correctly perceived the issue to be whether Respondent was subject to constitutionally cognizable compulsion which would render the Fifth Amendment privilege self-executing. The Court followed precisely the analysis in *Murphy* but then came to the erroneous conclusion that *Murphy* forbids any probation condition which has the incidental effect of infringing upon Fifth Amendment rights. While the parties disagree over the correctness of this analysis, there can be no legitimate question that the Montana Supreme Court viewed the federal and state constitutional privileges against self-incrimination as coterminous and relied on its misassessment of this Court's precedent to reach the result below.[1] Under these circumstances, and absent any statement that *Murphy* was simply persuasive authority, this Court has jurisdiction because the Montana court's decision, rather than being grounded independently in state law, was rooted firmly in the federal precedent.

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[1] This is, of course, consistent with the Montana court's prior decisions holding that the scope of the protection against compelled self-incrimination under article II, section 25 of the Montana Constitution, and that provided by the Fifth Amendment, are identical. *See, e.g., State v. Jackson*, 672 P.2d 255, 260 (Mont. 1983).

II.

Respondent's claim that the question presented has no basis in the Montana Supreme Court's decision is without merit. It is absolutely clear that Respondent accepted the benefits of his probationary status. Even were the voluntary character of his consent to the terms of the probation not apparent from the stipulated facts, the transcript of the original sentencing hearing reveals that Respondent did, in fact, agree to the probationary conditions, including the requirement that he honestly disclose his offending history. Respondent's counsel specifically acknowledged that his client would be required to make "full and complete disclosures" as a condition of probation, and represented to the state trial court that Respondent "intends to do that completely." Sent. Tr. at 197-98. Upon pronouncing sentence, the court advised Respondent that failure to abide by any one of the conditions imposed "will result in your being arrested and put in jail." Sent. Tr. at 201.

It is not fairly disputable, then, that Respondent voluntarily entered into the treatment program with the understanding that he would be required to make disclosures therein. The cases cited in the petition regarding choices put to a criminal defendant are therefore relevant, both factually and legally, to the question presented, and the question is properly before this Court.

III.

Respondent makes the same mistake when interpreting *Minnesota v. Murphy* as did the Montana Supreme Court and those other courts which have held that a

State, by requiring a probationer to disclose offending history for purposes of treatment as a condition of probation, creates the "classic penalty" situation rendering the Fifth Amendment privilege self-executing.

The so-called "penalty" cases which preceded *Murphy* make plain that a State may not compel testimony by threatening to inflict sanctions unless the constitutional privilege against self-incrimination is surrendered. In those cases, however, the threat was employed to secure abandonment of the privilege during an ongoing investigation into the individual's criminal culpability. *See, e.g., Garrity v. New Jersey*, 385 U.S. 493 (1967) (threatened loss of employment); *Lefkowitz v. Cunningham*, 431 U.S. 801 (1977) (threatened termination of political office).

This Court in *Murphy* distinguished the penalty cases on the basis that "Murphy was not expressly informed . . . that an assertion of the privilege would result in the imposition of a penalty" and that "the State could not constitutionally carry out a threat to revoke probation for the legitimate exercise of the Fifth Amendment privilege." 465 U.S. at 438. The Montana Supreme Court erroneously construed this language to mean that the possibility of probation revocation for refusing to disclose honestly offending history as part of the treatment agreed upon as a condition of probation threatened probation revocation, and therefore created a "classic penalty" situation, for assertion of the privilege rather than for failure to comply with an otherwise perfectly

permissible condition of probation.[2] This interpretation unjustifiably expands the "penalty" exception developed in a line of cases involving individuals who had not been convicted of any crime, who were not under state penal supervision, and who were specifically threatened with sanctions if they did not *waive* their Fifth Amendment privilege and provide information that could assist the state in its criminal prosecution of these individuals. Respondent was not asked to waive that privilege with respect to the disclosures at issue; he remained free to assert the privilege and to assume the risk of probation revocation to the extent he might be deemed to have not complied with the condition that he truthfully disclose all offending history.

The Court's decision in *Murphy* must be interpreted in a similar vein. The *Murphy* Court was simply addressing the situation where the State uses the bald threat of probation revocation in retaliation for a probationer's assertion, or possible assertion, of the privilege against self-incrimination. Where, as in this case, acceptance of responsibility is required in order to qualify for lenient sentencing treatment, the specter of probation revocation serves valid penalogical interests favoring lenient treatment of convicted sex offenders who consent to participate in noninstitutional therapy in return for complying with certain rules – e.g., disclosure of any offending

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[2] As noted in the petition, this confusion is not unique. At least four other courts have similarly misconstrued *Murphy* in the context of sex offender treatment. See *State v. Gleason*, 576 A.2d 1246 (Vt. 1990); *State v. Eccles*, 877 P.2d 799 (Ariz. 1994); *Gyles v. State*, 901 P.2d 1143 (Alaska Ct. App. 1995); *Mace v. Amestoy*, 765 F. Supp. 847 (D. Vt. 1991).

history – without which the very purpose of the therapy would be defeated. The Montana Supreme Court's reliance on *Murphy* for a contrary conclusion was incorrect.

IV.

Respondent claims that a therapist most likely would terminate a probationer who disclosed prior offenses during treatment and that public safety would be adequately protected by the ensuing revocation proceedings. There is no indication here that Respondent's disclosures that he had raped and molested three other girls were a factor in the revocation of his probation. In any event, even if a probationer was terminated from the program on the basis of his disclosures, the decision whether to seek probation revocation belongs to the prosecutor, not the therapist.

Respondent's position assumes that the public has no interest in prosecuting an offender who reveals prior offenses, no matter how numerous or heinous, as long as the probationer is returned to prison to serve the remaining portion of his sentence. This result, however, is contrary to *Murphy* where the Court implicitly recognized the public interest served by prosecuting a probationer who revealed a previously unknown murder during sex offender treatment.

Petitioner does not assert, as Respondent implies, that everyone who enters a therapy program will be charged on the basis of admissions made to his therapist or automatically have his probation revoked upon assertion of the privilege against self-incrimination. (Opp. Br.

at 17.) Again, probation revocation is not premised on the privilege's assertion; the prosecutor may choose to seek revocation based on the therapist's determination that an integral condition of the therapy has not been complied with. There is, moreover, no assurance that every admission with respect to uncharged crimes will be used for purposes of an independent prosecution. Prosecution decisions presumably will be made with reference to factors like the nature or severity of the uncharged conduct and the perceived threat to public safety. The probationer, no less than the therapist or prosecutor, often may be in a quandary as to the appropriate course of action, but that quandary is not the result of being placed in the constitutionally proscribed position of having a penalty imposed for asserting the right against self-incrimination. It is the result of having embarked knowingly and freely on a course that required certain disclosures as the quid pro quo for the very real and immediate benefit of conditional freedom.

CONCLUSION

For these reasons and those set out in the petition, the Petitioner requests that a writ of certiorari issue herein.

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